TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1632.

EX PARTE: IN THE MATTER OF SHIBUYA JUGIRO, APPELLANT.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED FEBRUARY 27, 1891.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE APPEAL

68 OF

JOSEPH WOOD.

To ROBERT J. HAIRE, Esq., 23 *Chambers street, New York City:*

SIR.—You will please take notice that I shall move the Supreme Court of the United States, a term of which is now being held at the city of Washington, District of Columbia, on the 9th day of March, 1891, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for the following relief, judgment or order:

First. That the appeal herein taken by you in behalf of Joseph Wood, heretofore convicted of murder at a court of General
69 Sessions of the Peace, held in and for the city and county of New York, which appeal was taken from an order made by the Hon. Addison Brown, acting as a Circuit Judge of the United States at a court held by him on the 28th of November, 1890, denying the petition of the said appellant for a writ of *habeas corpus*, be in all things dismissed; or that the order so appealed from be affirmed on the ground that the said appeal was taken for delay only, and on the further ground that the Supreme Court has no jurisdiction of said appeal, and that the question on which the same depends is so frivolous as not to need further argument.

Second. That in case the said Supreme Court shall deny the said
70 motion to dismiss or confirm, then that the said court make an order that the said appeal and case be advanced for argument, and the record thereof printed at such an early day as to the said Supreme Court may seem meet and proper, in order that the same may be speedily heard and determined.

Third. For such other and further relief as in the premises may be meet and proper.

And you will further take notice that this motion will be made upon the petition of the undersigned and upon all the papers and exhibits thereto attached, copies of which are herewith served upon
71 you, and also upon the record filed in the office of the clerk of the Supreme Court.

Dated *February* 10, 1891.

CHARLES E. TABOR, *Att'y-Gen'l,*
Attorney for A. A. Brush, Agent and Warden,
and for the State of New York, Appellees herein.
Office and post-office address, Capitol, Albany, N. Y.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., MARCH 25, 1891.

1 To the judges of the circuit court of the United States for the southern district of New York:

The petition of Shibuya Jugiro, by Roger M. Sherman, his attorney, respectfully shows unto your honors that he is unlawfully imprisoned and restrained of his liberty, contrary to law and in violation of the Constitution of the United States and of the statutes of the United States, by Augustus A. Brush, as agent and warden of the State prison at Sing Sing, in the southern district of New York.

The facts concerning the detention of your petitioner and the claim or authority by virtue of which he is so detained are as follows:

Your petitioner was convicted by the name of Schihiok Jugigo in the court of oyer and terminer, in the county of New York, on or about December 3rd, 1889, of the crime of murder, and on December 16th, 1889, was sentenced to death. Said sentence was by an appeal pending in the court of appeals until December 1st, 1890, stayed.

On September 9th, 1890, a petition was duly filed in the said circuit court of the United States for a writ of *habeas corpus* to examine into the cause of the detention of your petitioner upon the claim that his judgment and sentence was void under the Constitution of the United States, and such proceedings were thereupon had that an appeal was duly allowed to the Supreme Court of the United States from a decision of said court in the premises, and that final judgment in said proceedings was not on December 1st, 1890,

2 and has not yet been entered, and no mandate has been issued out of said Supreme Court upon which final judgment in said proceedings could be entered.

On said 1st day of December, 1890, petitioner was arraigned before said court of oyer and terminer, and, being then and there required to allege why a day should not be fixed to put him to death under said judgment and sentence, he duly showed and sustained by full, complete, and due proof the fact aforesaid, and duly objected that by force of section 766 of the Revised Statutes of the United States any proceedings to carry out said judgment or sentence in said court of oyer and terminer or by or under the authority of the State of New York before final judgment should be entered in said proceedings in said circuit court were null and void.

But said court of oyer and terminer then and there disregarded and refused to entertain his said objection, allegation, and proof and sentenced him to be put to death in the week commencing January 12th, 1891, and remanded him to the custody of said Augustus A. Brush to be executed accordingly, and said Augustus A. Brush now holds petitioner and restrains him of his liberty for the purpose of so killing your petitioner in violation of said statute of the United States and not otherwise.

Also in this, that whereas by the constitution and laws of the State of New York said petitioner was upon the trial of the indictment aforesaid entitled to counsel and appeared upon his arraign-

ment without counsel, and was asked by the said court of
3 oyer and terminer if he desired the aid of counsel, and answered that he did, the said court thereupon assigned him as counsel, who afterwards took part in all the proceedings upon said indictment and directed and controlled the defense thereunder, one not admitted or qualified to practice as an attorney or counselor at law in the courts of said State, of which petitioner was at all times in all the proceedings aforesaid ignorant, and thereby petitioner was deprived of due process of law for his defense; and particularly in this, that whereas petitioner was an alien subject of the Emperor of Japan and unacquainted with the laws of the State of New York, and was unable to speak or understand the English language, he was obliged to rely wholly upon said counsel for his defense and for the presentation of each and all objections, evidence, and arguments which were useful, convenient, or necessary for the protection of his rights. The said indictment alleged that the wound inflicted by petitioner was in the breast of one Mura Commi, who was alleged to have been murdered by petitioner. The issue tried was whether petitioner had wounded said Commi in self-defense or without provocation by stabbing him from behind. The proof was that the wound was not in the breast, but in the neck, from behind. Having no notice by said indictment that petitioner would be called upon to explain a wound from behind, said allegation was misleading, and the proof was a substantial variance from the indictment, which petitioner is advised would have constituted a valid objection to
4 the admission of evidence, the reception of a verdict, and in arrest of judgment had his rights in that behalf been duly asserted by lawful counsel. But all the occasions having passed when in the lawful course of procedure the objection could be taken, not having been duly taken, reserved, and presented, petitioner has suffered great prejudice, and in other respects his rights upon his trial were prejudiced and sacrificed by the said assignment of counsel.

But now so it is that neither by motion for a new trial nor by motion in arrest of judgment nor otherwise, under the limitations of the laws of the State of New York, can any court of said State take cognizance or afford petitioner any relief in the premises, and petitioner has no remedy or protection in respect thereto, except under the fourteenth amendment to the Constitution of the United States as an additional guaranty to the constitution of the State of New York, for his protection upon an equality with all in the enjoyment of his right to the assistance of counsel and to due process of law in that respect.

And therefore petitioner alleges that said judgment and sentence and his restraint thereunder are without due process of law.

Also in this, that said indictment was found by a grand jury in the court of general sessions of the peace in and for the city and county of New York, at the November term of said court, 1889; that from the list and panel of jurors from which said grand jury was selected and drawn, certain and all persons of the color
5 and race of petitioner, who is a native-born subject of the Em-

peror of Japan and dark brown in color, were excluded on account of their said race and color, although many persons of said race and color, naturalized citizens of the United States and in all respects qualified to serve as such jurors, were, at the time of the selection of said list and panel, resident and being within said city and county, and who might otherwise have been drawn to serve upon said grand jury; and the same is true of the petit jury drawn to try the said indictment.

Petitioner was ignorant of said facts in respect to said jurors at all the times aforesaid.

But now so it is that neither by motion for a new trial nor by motion in arrest of judgment nor otherwise under the limitations of the laws of the State of New York can any court of said State take cognizance of or afford petitioner any relief in the premises; and petitioner has no remedy or protection in respect thereto, except under the fourteenth amendment of the Constitution of the United States, for his right to the equal protection and due process of law in the premises.

And therefore petitioner alleges that said indictment and the proceedings thereupon and his restraint thereunder are in violation of the laws and the Constitution of the United States and void.

Your petitioner therefore prays that this honorable court do forthwith issue the writ of *habeas corpus* to the said Augustus A.
6 Brush, agent and warden as aforesaid, requiring him to produce the body of said petitioner before this court at some time to be designated in said writ, there to abide what shall be awarded by said court in the premises, and at the same time he prays your honors to issue out of said court the writ of certiorari to the said court of oyer and terminer in said county of New York, and the clerk thereof, commanding it or him forthwith to certify to the said circuit court of the United States true copies of the indictment, judgment-roll, orders, commitments, and warrants, and objections, motions, certificates, and proceedings in said court remaining, and particularly such as were filed or had December 1st, 1891, under or by virtue of which said petitioner is now deprived of his liberty by authority of that court.

ROGER M. SHERMAN,
Attorney for Petitioner.

COUNTY OF NEW YORK, *ss:*

Roger M. Sherman, being duly sworn, says that he is authorized by Shibuya Jugiro, the petitioner, to make, sign, and verify the foregoing petition; that he has read the same and knows its contents, and that the same is true, to his knowledge, information, and belief.

ROGER M. SHERMAN.

Sworn to before me this 3rd day of January, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

7 Endorsed: U. S. circuit court, so. dist. of New York. *Ex parte* Jugiro. No. 2. Petition for writ of *habeas corpus.* Roger M. Sherman, att'y for pet'r, 140 Nassau St., New York, N. Y. U. S. circuit court. Filed Jan. 7, 1891. John A. Shields, clerk.

8 At a stated term of the circuit court of the United States for the southern district of New York, held in the United States court building, in the city of New York, on the 7th day of January, 1891.

Present: Hon. E. Henry Lacombe, circuit judge.

Ex Parte SHIBUYA JUGIRO.

A petition on behalf of Shibuya Jugiro having been duly presented to this court for a writ of *habeas corpus* to inquire into the cause of his detention at Sing Sing prison, in the southern district of New York, by Augustus A. Brush, agent and warden of said prison, and for relief in the premises, now, on reading and filing said petition and after hearing Roger M. Sherman, Esq., of counsel for said petitioner, it is—

Ordered that the prayer of said petition be, and the same hereby is, in all things denied.

E. HENRY LACOMBE.

(Endorsed:) U. S. circuit court, so. dist. of N. Y. *Ex parte* Jugiro. No. 2. Order denying petition for writ of *hab. corp.*, &c. Roger M. Sherman, att'y for pet'r, 140 Nassau St., New York. U. S. circuit court. Filed Jan. 7th, 1881. John A. Shields, clerk.

9 U. S. Circuit Court, Southern District of New York.

Ex Parte SHIBUYA JUGIRO, Petitioner for a Writ of *Habeas Corpus.* No. 2.

LACOMBE, *Circuit Judge:*

The prayer of the petitioner for a writ of *habeas corpus* to enquire into the cause of his detention at Sing Sing prison, in this district, under a conviction in the State court, in violation, as he alleges, of the Constitution and statutes of the United States, having been denied and order thereupon duly entered, he now appeals therefrom to the Supreme Court. Such an appeal, under sections 763 and 764 of the U. S. Revised Statutes (as amended by the act of March 3rd, 1885), is accorded to him as an absolute statutory right. The appeal and citation, when issued more than thirty days before the first day of the next term of the Supreme Court, must be returnable on the first day of said term. (Supreme Court, rule 8, subdivision 5.) The judge of the circuit court, who, by section 999 U. S. Rev. Stat., is required to sign such citation, has no discretion to fix any earlier return day.

This is the second application to this court for a writ of *habeas corpus* by this petitioner under the same conviction, and two of the

grounds upon which he bases his present application, viz.,
10 the alleged fact that persons of his race and color were excluded because of their race and color from the jury list and panel and the alleged fact that proper counsel were not assigned to him by the State court, existed when he made his former application. Whether this is the second or the twenty-second application, however, is immaterial. Under the statutes as they stand it seems to be left for the petitioner alone to determine not only how many times he will apply for the writ and whether he will appeal from its denial, but also how often he will, by such appeal, invoke the operation of section 766, U. S. Rev. Stat., which provides that until final judgment thereon any proceeding against his person under State authority shall be null and void. What the precise effect of the peculiar phraseology of the last-cited section may be—whether, pending such appeal, it operates as a stay or merely as a warning that whoever, under State authority, may take any proceeding against the person of the petitioner does so at his peril—is not now before this court for decision. The only matters now presented on the appeal are its formal allowance and the fixing of the return day, as to both of which this court has no discretion.

E. HENRY LACOMBE.

January 7, 1891.

Endorsed: No. 2. Circuit court of the United States for the southern district of New York. *Ex parte* Shibuya Jugiro, petitioner, for a writ of *habeas corpus*. Decision. Lacombe, J. U. S. circuit court. Filed Jan. 7, 1891. John A. Shields, clerk.

11 United States Circuit Court, Southern District of New York.

Ex Parte SHIBUYA JUGIRO.

The petitioner, Shibuya Jugiro, conceiving himself aggrieved by the final decision of this court declining to grant the writ of *habeas corpus* herein, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed and that a transcript of the record herein may be sent to the said Supreme Court.

Dated New York, January 7th, 1891.

ROGER M. SHERMAN,
Attorney for Petitioner.

The foregoing appeal is hereby allowed, and the clerk of this court is hereby directed to send to the Supreme Court of the United States a transcript of the petition, decision, order thereupon, and of this appeal.

Dated New York, January 7th, 1891.

E. HENRY LACOMBE,
Circuit Judge.

Endorsed: U. S. circuit court, so. dist. of N. Y. *Ex parte* Jugiro. No. 2. Appeal. Service of a copy of within admitted Jan'y 8, 1891.

Charles F. Tabor, att'y general of New York. Roger M. Sherman, att'y for pet'r, 140 Nassau street, New York. U. S. circuit court. Filed Feb. 13, 1891. John A. Shields, clerk.

12 UNITED STATES OF AMERICA, *Southern District of New York,* } ss:

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, do hereby certify that the foregoing pages numbered from 1 to 11, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the *ex parte* application of Shibuya Jugiro for a writ of *habeas corpus* (number 2), as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-one and of the Independence of the said United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 1632. *Ex parte:* In the matter of Shibuya Jugiro, appellant. Filed February 27, 1891.

Office Supreme Court U. S.
FILED,
APR 8 1891
JAMES H. McKENNEY
CLERK

SUPREME COURT OF THE UNITED STATES.

No. 1632.

OCTOBER TERM, 1890.

SHIBUYA JUGIRO,
Appellant,

vs.

AUGUSTUS A. BRUSH,
Appellee.

ARGUMENT FOR APPELLANT.

ROGER M. SHERMAN,
Of Counsel for Appellant,
140 NASSAU STREET,
New York City.

EVENING POST JOB PRINT, NEW YORK.

Charles F. Tabor, att'y general of New York. Roger M. Sherman, att'y for pet'r, 140 Nassau street, New York. U. S. circuit court. Filed Feb. 13, 1891. John A. Shields, clerk.

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In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-one and of the Independence of the said United States the one hundred and fifteenth.

Seal of U. S. Circuit Court, South. Dist. New York.

JOHN A. SHIELDS, *Clerk.*

Endorsed on cover: S. New York C. C. U. S. No. 1632. *Ex parte:* In the matter of Shibuya Jugiro, appellant. Filed February 27, 1891.

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SUPREME COURT OF THE UNITED STATES.

No. 1632.

OCTOBER TERM, 1890.

SHIBUYA JUGIRO,
Appellant,

vs.

AUGUSTUS A. BRUSH,
Appellee.

ARGUMENT FOR APPELLANT.

ROGER M. SHERMAN,
Of Counsel for Appellant,
140 NASSAU STREET,
New York City.

EVENING POST JOB PRINT, NEW YORK.

In the Supreme Court of the United States.

SHIBUYA JUGIRO,
Appellant,

vs.

AUGUSTUS A. BRUSH,
Appellee.

ARGUMENT FOR APPELLANT.

Statement.

This is an appeal from a decision of the Circuit Court for the Southern District of New York, refusing the writ of *habeas corpus*.

The grounds of the petition below were three:

FIRST.—The petitioner is in custody upon a warrant for his execution, made by a State Court, in violation of Section 766, Rev. Stat. U. S.

SECOND.—Upon his application to be assigned counsel upon his trial for murder, the State Court assigned one who controlled his defense, not a member of the bar. The judgment was for that reason void. He is an alien subject of Japan, and this disregard of his rights is a violation of the law of nations. He thus presents a controversy between

the people of a State and a foreign subject, which is within the judicial power of the United States.

THIRD.—He was indicted by a grand jury, and tried by a petit jury drawn from a panel, from which competent jurors of his race and color were excluded on account of such race and color.

Argument.

I.

IN REFERENCE TO THE VIOLATION OF SECTION 766, U. S. R. S.

It appears from the petition for the writ, that the Court of Oyer and Terminer on December 1, 1890, before the mandate of this Court upon its decision in the first case had gone to the Circuit Court, and before final judgment in that case, and against the appellant's objection, and upon full proof of that condition of the record, rendered judgment that Jugiro be executed on the week beginning January 12, 1891. That judgment remanded him to imprisonment for the purposes of that sentence. By Section 766 of the Revised Statutes of the United States such proceedings before final judgment in the *habeas corpus* case were null and void. That section, we submit, does not refer to a decision of this Court, as a finality, without a mandate. It does not leave the question of finality to depend upon newspaper reports of the decisions of this Court. It requires *ex necessitate* a judgment in the Circuit Court upon a mandate of this Court. There is no final judgment otherwise. The question is not of what this Court will take judicial notice, but of error in the Court below.

The State authorities deliberately overruled and ignored that prescription of the supreme law of the land. The Court below treated that prescription as mere *brutum fulmen*, incapable of enforcement. This appeal was taken to obtain the benefit of that statute.

There are consequences following, which the appellant is entitled to have declared by the Federal Court.

II.

IN REFERENCE TO THE ASSIGNMENT AS COUNSEL OF ONE NOT A MEMBER OF THE BAR.

Jugiro was an alien put on trial for his life, unable to speak or understand the English language; of all men in those straits, most at the mercy of his counsel. Under the provisions of the State Constitution and the laws passed for its enforcement, every man in that peril was entitled to have assigned for his defense counsel learned in the law. That is in New York a prescription of due process of law as much as an indictment. In that State all men under like circumstances are entitled to the enjoyment of that right. Jugiro prayed for this protection. The Court of Oyer and Terminer gave him not even the court crier. It gave him as counsel a fraudulent pretender who was there masquerading in the guise of a lawyer. A man who, in assuming the functions of Jugiro's defense, was himself a criminal (Sec. , Penal Code). This man directed and controlled the defense. As might be expected, Jugiro's legal rights were abandoned.

For instance: The indictment warned Jugiro that he was accused of killing by meeting his adversary

face to face and striking him in the breast. It must be presumed that such was the testimony before the Grand Jury of the witnesses for the People. The justification for the killing was self-defense. Upon the trial the witnesses for the People were allowed to testify that the wound did not touch the breast, but was inflicted in the neck from behind. It needs no elaborate argument to demonstrate to judges that such an indictment is a trap. It is plain that the witnesses for the People committed perjury either before the Grand Jury or upon the trial.

It has been the law that the description of the wound in an indictment for murder must be so precise that from the statement you could lay your finger on the spot.

The laxity of modern practice has never modified this rule to the prejudice of the accused (Sanchez *v.* People, 22 N. Y., 149). But this so-called counsel did not in any way protect his client in this particular.

There are grounds for relief in respect to this grievance which he occupies, in common with citizens of the State of New York. But aside from that, this appellant was entitled to a remedy in the Circuit Court of the United States, in virtue of his situation as an *alien*, the subject of a friendly monarch, under the laws of nations.

The proper attitude of this Government towards other sovereign States, in respect to that international morality which creates the obligation of protection to friendly aliens, is settled upon high authority. It may be the part of a defensive diplomacy after the wrong is done to demand proof that in a particular grievance the nationalty of the sufferer was the motive which prompted the outrage. But in respect to preventive measures the dignified, honorable and worthy view is that which affirmatively looks to it that the foreigner shall not be op-

pressed with those indignities or wrongs from which each State can be relied upon to protect its own citizens.

Such is the requirement of that hospitality which is demanded by nations, no less than that which receives the approbation of men.

Such was the principle for which this Government successfully contended at Geneva. Such was the obligation then asserted against Great Britain to prevent the depredations of the *Alabama*.

Our judicial system is full of it. It is upon that principle that the Federal Courts have always been open to aliens in their civil controversies, by original plea or by removal.

The statutes are full of the sense of the legislative branch of the Government, that with the General Government lay the duty of securing to the friendly alien the common justice of nations.

Much has been said in criticism of our Constitution for a supposed lack of power on the part of the General Government to compel within a State the security accorded by treaty or by international law to foreigners. That criticism is unfounded. If the statutes are incomplete in that respect it is only because a constitutional power has lain dormant. The Constitution is not open to that gross imputation upon the profound wisdom of the fathers.

On the contrary, it contains a plain recognition of the principle for which we are contending.

By Art. I., Section 8, Subd. 10, "The Congress shall have power * * * to define and punish * * * offenses against the law of nations."

Baldwin *v.* Franks, 120 U. S., 678.

By Art. III., Section 2, Subd. 1, "The judicial power of the United States shall extend to all cases arising under this Constitution; * * * to con-

troversies between a State or the citizens thereof and foreign * * * citizens or subjects."

It thus appears that the constitutional power of this Government to define and punish offenses against the law of nations, and to interfere between a State of the Union or its People and a foreign subject, is coextensive with its obligations to other governments, either by treaty or by the law of nations.

Occasions, doubtless, may arise where these provisions could not be made self-executing. No punishment *ex post facto* could be administered in the absence of an Act of Congress, against the transgressors. But respecting preventive measures within the limits here involved, the power is ample for relief in the manner here sought.

In Burrus' Case, 136 U. S., 591, Mr. Justice Miller says:

"The net result of the discussion is that all the Courts of the United States, and the Justices and Judges of all its Courts, are authorized to issue the writ of *habeas corpus* in every case where a party is imprisoned or held in custody * * * where it is supposed to be in violation of the law of nations or of the United States; in all which cases the Federal Courts and Judges have jurisdiction to make inquiry into the matter, and in the language of the statute, when the prisoner is brought before them and the matter is inquired into, the Court or Justice or Judge shall 'dispose of the party as law and justice require.'"

As is said by Mr. Attorney-General in Neagle's case, 135 U. S., 12, "Section 753 does not attempt to limit the right of the Court to issue the writ in any case covered by the Constitution. * * * It

does, by a process of exclusion and definition, make more clear some of the cases to which the Federal jurisdiction extends."

The privilege of the writ of *habeas corpus* and the definition of judicial power are fundamental in the organic law. They are correlative. Congress has no power to limit their reciprocal operation.

Jugiro is deprived of a right so essential to justice, so established by the organic law of New York, that its deprivation impairs and renders void even a civil judgment against a citizen.

Newburger *v.* Campbell, 58 How. P., 313.

A fortiori in a capital, criminal case the judgment was void.

Cancemi *v.* People, 18 N. Y., 135–139.
In re Stapf, 63 Wis., 285, 288, 293.

In the language of this Court in

Windsor *v.* McVeigh, 93 U. S., 280, 281,

Mr. Justice Field:

"If the party has no opportunity of making a defense, the sentence is not so much a judicial sentence as an arbitrary, sovereign edict. It has none of the elements of a judicial proceeding and deserves not the respect of any foreign nation. It ought to have no intrinsic credit given to it, either for its justice or for its truth, by any foreign tribunal. * * * Upon the eternal principles of justice it ought to have no binding obligation, * * * for it tramples under foot all the doctrines of international law, and is but a solemn fraud if it is clothed with all the forms of a judicial proceeding."

This unfortunate prisoner asserts that the People of the State of New York have committed this violation of the law of nations, to his utter undoing.

This controversy between the People of the State of New York and him, thus asserted, is properly within the judicial power of the United States as defined by its Constitution. Such is his contention. Does it lie within the field of the law of nations?

It is unnecessary to show that the disregard of that right might furnish just occasion for complaint by the Government of Japan.

The reciprocal obligations recognized by civilized nations need no longer be referred to the category of *casus belli*.

President Woolsey in his International Law well says (Sec. 65): "The obligation to treat foreigners with humanity and to protect them when once admitted into a country, depends not upon their belonging to a certain political community which has a function to defend its members, nor wholly on treaty, but on the essential rights of human nature."

President Woolsey while observing (Sec. 66) that foreigners admitted into a country are subject to its laws and punished for disobeying them, asserts, in that connection, the obligation of protection, and that "failure to secure this, or any act of oppression may be a ground of complaint, of retorsion or even of war on the part of their native country." He concludes that there should be equality with the native-born citizen in judicial processes.

In another place (Sec. 67) he points out that such equality in the courts was one of the rights which belonged to the *jus gentium* even by the Roman civil law.

In the case of Benson *v.* McMahon, 127 U. S., 466, Mr. Justice Miller says that "the Roman civil law then pervaded the jurisprudence of the larger portion of the civilized nations of the earth."

The principle of construction of that case may also be invoked here. The obligation of the treaty

with Mexico was there read in the light of the liberal demands of international comity instead of the narrow tests of the Statutes of New York.

We will not follow the Attorney General of New York in exploring the barbarities of the English common law, in search of the time when a prisoner on trial for his life was denied the assistance of counsel or even witnesses in his behalf. So lately as the Sixth Amendment of the Federal Constitution the universal sense was voiced that due process of law, involved, upon a trial for crime, compulsory process for obtaining witnesses for the accused, and the assistance of counsel for his defense.

The facts alleged in the petition as to the assignment of counsel made Jugiro's trial a sad farce.

A judgment so obtained, we submit, is an arbitrary deprivation of life and liberty. Protection in the enjoyment of his rights, equal to all under like circumstances, was not secured to Jugiro.

The Attorney General of New York has argued that this right had been waived. There can be no waiver.

Cancemi *v.* People, *supra.*
In re Stap, *supra.*

But the possibility of waiver is excluded by the petition.

III.

THE EXCLUSION OF JAPANESE FROM THE PANEL WHENCE WERE DRAWN THE GRAND AND PETIT JURIES, RENDERED THE INDICTMENT AND SUBSEQUENT PROCEEDINGS VOID.

The petition below also made out a case under the Fourteenth Amendment.

The prisoner was indicted and tried by juries taken from a panel made up by the exclusion of competent jurors of his own race and color, on account of such race and color.

Ex parte Virginia, 100 U. S.
Rives *v.* Virginia, *Ibid.*
Stauder *v.* West Virginia, *Ibid.*
Neal *v.* Delaware, 103 U. S., 393.
Bush *v.* Kentucky, 107 U. S., 119.

IV.

AFTER JUDGMENT AND AT THE TIME OF THE SENTENCE THERE WAS NO OTHER REMEDY.

The Attorney General does not pretend that due process of law permits these things. He rests upon the proposition that there is due process of law for the *redress of such grievances* in the administration of the State courts.

There is force in this contention as applied to the citizens of New York.

We concede as the result of the cases that ordinarily such rights must be pursued in the first instance in the State courts. But we reply that the Federal courts have an independent jurisdiction of this controversy as one between the People of that State and a foreign subject. If not, however, we contend that where the State courts afford no remedy, the Federal courts must uphold the constitutional right and the Law of Nations. The provisions of the Code of Criminal Procedure of the State of New York, which are exclusive in their prescriptions, at the time of his discovery of these errors afforded Jugiro no remedy.

If he had known of the exclusion of Japanese earlier, it might be supposed that the first occasion when it might be presented would be upon a challenge to the array.

By Sec. 238 of the Code of Criminal Procedure, challenges to the array are abolished, and the causes prescribed for which the panel may be discharged do not include any such objection. Of course no challenge to particular jurors could raise the question. The right is not to have a particular juror accepted or excluded; but only that the panel shall not be made up by excluding one of the same race and color as the defendant, by reason of such race and color. The causes for which an indictment may be quashed or set aside are prescribed by Sec. 313 of that Code and do not include any such objection.

The grounds of demurrer to an indictment allowed by Sec. 323 do not include any such objection.

Motions for a new trial under Sec. 465 cannot be made for any such cause.

Under Section 467 judgment cannot be arrested for any such cause.

In such a case the right is so bound up in the remedy that the deprivation of the remedy is a deprivation of the right.

The facts respecting these grievances, the petition alleges, were not known to appellant until after his trial, judgment and sentence, or so late even as his resentence, December 1, 1890.

The statute under which the sentence was imposed (Section 4, Chap. 489, Laws of 1888) has been construed by the Court of General Sessions in the case of *Ex parte* JOSEPH WOODS (see record in his case in this Court). That Court there held that the exclusion of negroes from the panel cannot be considered after judgment.

The Court of Oyer and Terminer held in this case that no appeal would lie after proceedings under

that section of the Act of 1888 (see affidavit filed in this case on motion to advance).

Both courts are of co-ordinate jurisdiction and are, therefore, the highest courts of New York where the matter can be brought in question.

The highest courts in New York competent to pass upon these questions, then, have held that there is no remedy in the State courts to redress these wrongs. The Attorney General has cited Section 519 of the Court of Criminal Procedure to the contrary. But this section relates to proceedings in the Supreme Court. That is, to crimes not capital. It will be seen from Section 517 of the Code of Criminal Procedure that appeals *in capital cases* are taken to the Court of Appeals directly. The Supreme Court has nothing to do with them.

The Oyer and Terminer is not the Supreme Court and Section 519 has no application.

We submit, therefore, that the argument that we have not exhausted our remedy in the State courts is fallacious, both as matter of law and fact.

If, then, such deprivation of the rights of a defendant upon trial for his life transpires after judgment, must he die in violation of law for want of a remedy?

We may be compelled to say to a friendly foreign power: "This Government has not enacted the necessary statutes to enable it to punish crimes against the laws of nations here committed upon the person of your subjects."

Will this Court say to Japan: "The power to declare war does not rest with New York, but the power of New York to infringe the obligations of international law in the trial for his life of a subject of Japan is not within the control of the Federal tribunals?"

We submit that both in the exercise of that power and to afford the additional guaranty provided by

the Fourteenth Amendment, the remedy invoked below should be accorded and the decision reversed.

Dated Washington, April 6, 1891.

ROGER M. SHERMAN,
Of Counsel for Appellant,
140 Nassau Street,
New York City.

Office Supreme Court U. S.
FILED,
MAR 9 1891
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

IN THE MATTER OF THE APPEAL OF SHIBUYA JUGIRO.

Affidavit and Argument to Oppose Hearing of Motion to Dismiss Appeal.

ROGER M. SHERMAN,
Of Counsel for Appellant,
140 NASSAU STREET,
New York City.

In the Supreme Court of the United States.

IN THE MATTER OF THE APPEAL

of

SHIBUYA JUGIRO.

Argument to oppose hearing of motion to dismiss, affirm or advance.

STATEMENT.

This is an appeal from a decision of the Circuit Court for the Southern District of New York, refusing the writ of *habeas corpus*. The Attorney General of New York, before the term at which the appeal has been made returnable, *and the record not being in this Court*, served notice of this motion on February 16, 1891. The petition below was not correctly printed in his motion papers. His attention was called to this. He then requested counsel for appellant to allow his notice to stand for March 9th, upon his printing the petition correctly and serving an amended brief. Appellant's counsel consented to this. To nothing else.

On February 28th, the Attorney General served, besides the papers contemplated, two affidavits. These introduce matters *dehors* the record, proper

to be presented by return to the writ and to be traversed and tried in the Court below.

Appellant is not ready or called upon now, here, to try them. The notice of their presentation is not timely under the Sixth Rule. The important affidavit is made by John Sparks, Clerk of the Oyer and Terminer. We submit an affidavit to show that this witness, whose testimony relates to the record in his official custody, has refused, upon our request, to certify that record, and that, if properly presented, it would show that an appeal was taken from the judgment complained of, which appeal has been ignored. His affidavit, as a substitute for the exemplification of his record, is a *suppressio veri*.

WE SUBMIT, THEREFORE, THAT THE ATTORNEY GENERAL IS NOT WITHIN THE PRACTICE AS PRESCRIBED BY THE 6TH RULE AND BY

Ex Parte Russell, 94 U. S., 671.

The absence of the citation is no excuse for the absence of the record. The function of the citation is to bring an adversary into court.

He has come voluntarily.

But if the motion must now proceed, we suggest that there is no precedent for advancing the cause for argument before the term at which the appeal is returnable. The practice which the Attorney General invokes has been limited to the dismissal of appeals, plainly frivolous or without jurisdiction.

UPON THE CONTENTION THAT THE APPEAL IS FRIVOLOUS AND TAKEN ONLY FOR DELAY.

The Court of Oyer and Terminer on December 1st, 1890, before the mandate of this Court upon its decision in the first case had gone to the Circuit Court, and before final judgment in that case, and against the appellant's objection, and upon full proof of that condition of the record, rendered judgment that Jugiro be executed on the week begin-

ning January 12, 1891. That judgment remanded him to imprisonment for the purposes of that sentence. By Section 766 of the Revised Statutes of the United States such proceedings, before final judgment in the *habeas corpus* proceedings, were null and void. That section, we submit, does not refer to a decision of this Court. It does not leave the question of finality to depend upon newspaper reports of the decisions of this Court. It requires *ex necessitate* a judgment in the Circuit Court upon a mandate of this Court. There is no final judgment otherwise.

The State authorities deliberately overruled and ignored that prescription of the supreme law of the land. The Court below, as would appear by its opinion, if the record were here, treated that prescription as mere *brutum fulmen*, incapable of enforcement. This appeal was taken to obtain the benefit of that statute.

IN REFERENCE TO THE ASSIGMENT AS COUNSEL, IF ONE NOT A MEMBER OF THE BAR.

But that was not the only ground of this appeal. The petition below made out a case under the Fourteenth Amendment. The prisoner was indicted and tried by juries taken from a panel made up by the exclusion of competent jurors of his own race and color, on account of such race and color. He was an alien put on trial for his life, unable to speak or understand the English language; of all men in those straits, most at the mercy of his counsel. Under the provisions of the State Constitution and the laws passed for its enforcement, every man in that peril was entitled to have assigned for his defense counsel learned in the law. That is in New York a prescription of due process of law as much as an indictment. In that State all men under like circumstances are entitled to the enjoyment of that right. Jugiro prayed for this protection. The Court of Oyer and Terminer gave him not even the court crier. It gave him as counsel a

fraudulent pretender who was there masquerading in the guise of a lawyer. A man, as the Attorney General points out, who, in assuming the functions of Jugiro's defense, was himself a criminal. This man directed and controlled the defense. As might be expected Jugiro's legal rights were abandoned.

For instance: The indictment warned Jugiro that he was accused of killing by meeting his adversary face to face and striking him in the breast. It must be presumed that such was the testimony before the Grand Jury of the witnesses for the People. The justification for the killing was self defense. Upon the trial the witnesses for the People were allowed to testify that the wound did not touch the breast, but was inflicted in the neck from behind. It needs no elaborate argument to demonstrate to judges that such an indictment is a trap. It is plain that the witnesses for the People committed perjury either before the Grand Jury or upon the trial.

It has been the law that the description of the wound in an indictment for murder must be so precise that from the statement you could lay your finger on the spot.

The laxity of modern practice has never modified this rule to the prejudice of the accused. But this so called counsel did not in any way protect his client in this particular.

A judgment so obtained, we submit, is an arbitrary deprivation of life and liberty. Protection in the enjoyment of his rights, equal to all under like circumstances, was not secured to Jugiro.

These facts the petition alleges, were not known to appellant until after his trial, judgment and sentence, or so late even as December 1st, 1890.

The Attorney General does not pretend that due process of law permits these things. He rests upon the proposition that there is due process of law for the *redress of such grievances* in the administration of the State courts.

The Attorney General's contention ignores the

fact that the appellant, without his fault, was not aware of the facts during the trial.

In the absence of that averment, we concede, the facts alleged *dehors* the record by the Attorney General would be important upon a hearing under the writ in the court below. They might not be conclusive, even there.

They have no place here.

We concede as the result of the cases that such rights must be pursued in the first instance in the State courts. But we contend that where the State courts afford no remedy, the Federal courts will uphold the constitutional right. The provisions of the Code of Criminal Procedure of the State of New York, which are exclusive in their prescriptions, at the time of his discovery of these errors afforded Jugiro no remedy.

IN REFERENCE TO THE EXCLUSION OF JAPANESE FROM THE PANEL.

If he had known of this wrong earlier, it might be supposed that the first occasion when it might be presented would be upon a challenge to the array.

By Sec. 238, of the Code of Criminal Procedure, challenges to the array are abolished, and the causes prescribed for which the panel may be discharged do not include any such objection. Of course no challenge to particular jurors could raise the question. The right is not to have a particular juror accepted or excluded; but only that the panel shall not be made up by excluding one of the same race and color as the defendant, by reason of such race and color. The causes for which an indictment may be quashed or set aside are prescribed by Sec. 313 of that code and do not include any such objection.

The grounds of demurrer to an indictment allowed by Sec. 323 do not include any such objection.

Motions for a new trial under Sec. 465 cannot be made for any such cause.

Under Section 467 judgment cannot be arrested for any such cause.

In such a case the remedy is so bound up in the right that the deprivation of the remedy is a deprivation of the right.

AFTER JUDGMENT AND AT THE TIME OF THE SENTENCE THERE WAS NO REMEDY.

The statute under which the sentence was imposed (Section 4, Chap. 489, laws of 1888) has been construed by the Court of General Sessions in the case of EX PARTE JOSEPH WOODS (see record in his case in this Court). That Court there held that the exclusion of negroes from the panel cannot be considered after judgment.

The Court of Oyer and Terminer held in this case that no appeal would lie after proceedings under that section of the act of 1888. (See affidavit herewith.)

Both courts are of co-ordinate jurisdiction and are, therefore, the highest courts of New York where the matter can be brought in question.

The highest courts in New York competent to pass upon these questions, then, have held that there is no remedy in the State courts to redress these wrongs. The Attorney General cites Sec. 519 of the Code of Criminal Procedure to the contrary. But this section relates to proceedings in the Supreme Court. That is, to crimes not capital. It will be seen from Sec. 517 of the Code of Criminal Procedure that appeals *in capital cases* are taken to the Court of Appeals directly. The Supreme Court has nothing to do with them.

The Oyer and Terminer is not the Supreme Court and Sec. 519 has no application.

We submit therefore that the Attorney General's argument that we have not exhausted our remedy in the State courts is fallacious: both as matter of law and fact.

If, then, such deprivation of the rights of a defendant upon trial for his life transpires after judgment, must he die in violation of law for want of a remedy?

We submit that in just such a case the additional guaranty afforded by the Fourteenth Amendment may be invoked in the Federal courts.

The motion should be dismissed or else denied, and the appeal should stand and be docketed, heard and decided in due course of procedure.

Dated Washington, March 9, 1891.

ROGER M. SHERMAN,
Of Counsel for Appellant,
140 Nassau Street,
New York City.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE APPEAL
of
SHIBUYA JUGIRO.

STATE OF NEW YORK, }
County of New York, } ss. :

ROGER M. SHERMAN, being duly sworn, says: I am of counsel for the appellant, Shibuya Jugiro. On the 16th day of December, 1890, I filed with the Clerk of the Court of Oyer and Terminer for the County of New York, and served upon the District Attorney for that county, a notice of appeal from the proceedings had December 1st, 1890, in that Court, referred to in the petition for a writ of *habeas corpus* herein. The said clerk refused to make any return thereto, assigning as a reason that he had been instructed, both by the District Attorney and by the Presiding Justice of said court, that

no appeal would lie from those proceedings and that he should not make any return. The time fixed by law for such returns has long passed and none has been made.

I applied to said clerk on the 30th day of December, 1890, to certify the record in the case of the People against the defendant, here appellant, for use in this court, and tendered him his fees therefor; and he refused, saying that he had been instructed by said justice to refuse to certify anything whatever in reference to said case.

ROGER M. SHERMAN.

Sworn to before me this
7th day of March, 1891.

CHAS. H. KITCHEL,
Notary Public,
N. Y. Co.

MAR 2 1891
JAMES H. MCKENNEY
CLERK

1632

Supreme Court of the United States,

OCTOBER TERM, 1890.

IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

Petition and Notice to Dismiss, Affirm or Advance Case.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

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ROGER M. SHERMAN.

Sworn to before me this }
7th day of March, 1891. }

CHAS. H. KITCHEL,
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IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

Petition and Notice to Dismiss, Affirm or Advance Case.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1890.

IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

Petition and Notice to Dismiss, Affirm or Advance Case.

CHARLES F. TABOR,

Attorney-General of New York,

Of Counsel, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

To the Supreme Court of the United States:

The petition of Charles F. Tabor respectfully shows: That he is 1
Attorney-General of the State of New York, and as such is attorney for A. A. Brush, Agent and Warden of State Prison at Sing Sing, N. Y., and also attorney for the People of the State of New York in all matters in which said people have any interest.

Your petitioner further shows, upon information and belief, that on the 5th day of December, 1889, at a Court of Oyer and Terminer duly held in and for the city and county of New York, one Schihiok Jugigo was duly convicted of murder in the first degree of one Mura Commi, and that thereafter, and on the sixteenth day of December in the year aforesaid, at the said Court of Oyer and Terminer, judgment was duly entered and given on said conviction, 2
and the said Schihiok Jugigo by said judgment was duly sentenced to the punishment of death, and the said court also by said judgment did duly appoint the week commencing February 3, 1890, as the week within which the said sentence should be executed, and by said judgment it was further ordered that within ten days thereafter the sheriff of the said county of New York deliver the said Schihiok Jugigo, together with the warrant issued, to the agent and warden of Sing Sing State prison, he there to be kept as provided by law. A copy of said warrant is hereto annexed, marked "A."

Your petitioner, upon information and belief, alleges that the said 3
Schihiok Jugigo was within the ten days delivered over to said agent and warden at Sing Sing State prison, where he has ever since been confined pursuant to law.

Your petitioner further alleges, upon information and belief, that on or about the 21st day of December, 1889, the counsel for the
4 said Schihiok Jugigo duly appealed from said judgment of conviction to the Court of Appeals of the State of New York that such proceedings were thereafter had upon such appeal that on the 7th day of October, 1890, the said Court of Appeals handed down and announced its decision upon said appeal in and by which the said judgment of conviction of said Schihiok Jugigo was in all things affirmed.

Your petitioner further alleges, upon information and belief, that on or about the 12th day of September, 1890, one Roger W. Sherman, an attorney of the Supreme Court, presented a petition directed "to the judges of the Circuit Court of the United States
5 for the Southern District of New York," in and by which petition the petitioner did pray, in substance, that the said court should forthwith issue the writ of *habeas corpus* to Augustus A. Brush, Agent and Warden of Sing Sing prison, requiring him to produce the body of said Jugigo before the said court, then to abide what should be awarded by said court in the premises, and did also pray that a writ of *certiorari* issue to said Court of Oyer and Terminer.

That afterwards such proceedings were had that on the 12th day of September, 1890, an order was duly made by the said Circuit Court of the United States for the Southern District of New York
6 denying the prayer of said petitioner in all things.

That afterwards and on or about the 12th day of September, 1890, the said Roger M. Sherman, as attorney for the said Jugigo, did serve, or cause to be served, a notice of appeal from said order to this court, which appeal in form was allowed by Hon. E. Henry Lacombe, Circuit Judge; that on or about the 12th of September, 1890, a citation was issued by the said circuit judge, directed to your petitioner and the said agent and warden, requiring them to appear at a term of the Supreme Court, to be held at Washington on the second Monday of October, 1890, pursuant to said appeal, then and there to show cause, if any, why the decision
7 appealed from should not be corrected.

And your petitioner further shows that such proceedings were had upon said appeal that the same came on for argument before the Supreme Court, and the said court on or about the 21st day of November, 1890, duly made and entered its decision therein affirming,

in all things, the order made by Judge Lacombe on the twelfth of September aforesaid.

And that afterwards such proceedings were had that the judg- 8
ment of the Court of Appeals was made the judgment of the Supreme Court and the said Jugigo was thereafter on the 1st day of December, 1890, brought before the Oyer and Terminer duly held in and for the city and county of New York, that being the county where the conviction was had, and, in pursuance of sections 503 and 504 of the Code of Criminal Procedure of the State of New York, the said court did then duly issue its warrant, in due form of law, to the said Augustus A. Brush, the agent and warden of the State prison mentioned in the original warrant and sentence, commanding the said agent and warden, during the week commencing on the 12th of January, 1891, to do execution of the said sentence upon the 9
said Schihiok Jugigo; and that said warrant was under the hand of the judge presiding at said court.

And your petitioner further shows that thereafter, and on or about the 7th day of January, 1891, one Roger M. Sherman, claiming to be duly authorized by the said Jugigo, under the name of Shibuya Jugiro, did present a petition, verified by the said Sherman, to the Hon. E. Henry Lacombe, one of the circuit judges of the United States, praying for a writ of *habeas corpus* for the reasons and upon the grounds set forth in said petition. A copy of which petition is hereto annexed, marked "B."

10

And your petitioner further alleges that the said United States Circuit Court, held by the said E. Henry Lacombe, Circuit Judge, did then and there, on the said 7th day of January, 1891, deny the prayer of the said petition, and did then and there make an order refusing to grant said writ of *habeas corpus;* and that thereafter the said Roger M. Sherman did appeal from said order in behalf of said Jugigo, by the name of Shibuya Jugiro, to the Supreme Court of the United States; which appeal in form was allowed on the same day by Judge Lacombe, copies of which appeal and allowance is hereto annexed, marked "C." And the said Circuit Court did thereupon, on the same day, issue its citation directed to the 11
said Augustus A. Brush and to your petitioner, a copy of which citation is hereto annexed, marked "D," copies of which have been heretofore served upon the said A. A. Brush and upon your petitioner.

And your petitioner further shows that said agent and warden, under the advice of your petitioner, has not executed said sentence
12 upon the said Jugigo, but that he still holds him in his custody awaiting the direction and judgment of this honorable court.

And your petitioner further shows, upon information and belief, that the said appellant herein has not yet caused the said appeal or case to be docketed, nor has the record of the same yet been filed with the clerk of the Supreme Court, and that the said appellant neglects and refuses to file said citation with the clerk of the Circuit Court, all of which appears by said clerk's certificate and the affidavit of William J. Lardner hereto annexed, marked Exhibits "E" and "F," respectively.

And your petitioner further shows, upon information and belief,
13 that no appeal has ever been taken by the said Jugigo, or by any one in his behalf, from the action last before mentioned taken by the said Court of Oyer and Terminer, directing the execution of the sentence of death upon the said Schihiok Jugigo to any State court for a review thereof in any way or manner.

Your petitioner further shows, upon information and belief, that there are now under conviction and sentence of death in the State prisons of New York, which sentences are to be executed in accordance and under the provisions of chapter 489 of the Laws of 1888 of the State of New York, at least nine convicts. That said statute has been held to be constitutional in all respects, both by the Court of
14 Appeals of the State of New York and by this court, in the case of the People against William Kemmler, and of the appeal of said Jugigo. Your petitioner further alleges that while this appeal is pending and undetermined it is impossible to administer the law and carry out the execution of the sentence imposed by the judgment of the courts of the State of New York upon persons convicted of murder.

Your petitioner further alleges, upon information and belief, that there is no merit in this appeal, and that the said application for a writ of *habeas corpus* shows no grounds for the granting of the same; and no facts are stated in said petition to show that the
15 said Jugigo is restrained of his liberty in violation of the Constitution, or of any law or treaty of the United States, or that he is entitled to said writ upon any other ground mentioned in the laws of the United States, and that said appeal was taken for delay only.

Your petitioner further shows, upon information and belief, that the due administration and execution of the criminal laws of the State of New York require that this appeal be at once dismissed, 16
or that the order appealed from be affirmed, or that the same be advanced and set down for an early day for argument as to this court shall seem meet and proper.

Wherefore, your petitioner now prays that the appeal herein be dismissed, or the order appealed from be affirmed; or, failing in that, this appeal be advanced and set down for argument at an early day and the record ordered to be printed, and your petitioner will ever pray.

Dated, *February* 10, 1891.

CHARLES F. TABOR.

17

UNITED STATES OF AMERICA:

STATE OF NEW YORK,
City and County of Albany. } *ss.:*

Charles F. Tabor, being duly sworn, says: I am the petitioner named in the foregoing petition. I have read said petition, and know the contents thereof; and the same is true to my own knowledge except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe it to be true.

CHARLES F. TABOR. 18

Sworn to before me,
February 10, 1891.

WALTER L. CHILDS,
Notary Public, Albany County, N. Y.

"A."

The People of the State of New York, to the Agent and Warden of the State Prison of the State of New York, at Sing Sing, GREETING:

[SEAL.] 19

WHEREAS, at a Court of Oyer and Terminer held in and for the city and county of New York, at the City Hall of the said city, on the fifth day of December, in the year of our Lord one thousand

eight hundred and eighty-nine, *Schihiok Jugigo* was in due form of law convicted of murder in the first degree of one Mura Commi.

20 WHEREAS, thereafter and on the sixteenth day of December, in the year aforesaid, at the said Court of Oyer and Terminer, held in and for the said city and county, at the City Hall of the said city, judgment was given on the said conviction for murder in the first degree that the said *Schihiok Jugigo* be sentenced to the punishment of death, and the said court doth hereby appoint the week commencing the third day of February, in the year of our Lord one thousand eight hundred and ninety, the week within which the said sentence must be executed.

It is further ordered that the sheriff of said city and county, within ten days after the issuing of this warrant, is hereby directed
21 to deliver the said *Schihiok Jugigo*, together with this warrant, to the agent and warden of said State prison herein named, where the said *Schihiok Jugigo* shall be kept in solitary confinement.

Now, therefore, you, the said agent and warden of the said State prison, are required and by these presents strictly commanded to do execution of the said sentence upon the said *Schihiok Jugigo* according to law, upon some day within the week so appointed as aforesaid.

In witness whereof, I, John R. Brady, Justice of the Supreme Court, and who constitute the said court and the presiding judge
22 thereof, have hereunto subscribed my name, this sixteenth day of December, in the year of our Lord one thousand eight hundred and eighty-nine.

JNO. R. BRADY,
Justice Supreme Court and Oyer and Terminer.

Attest:

JOHN SPARKS,
Clerk of Court.

"B."

23 *To the Judges of the Circuit Court of the United States for the Southern District of New York:*

The petition of Shibuya Jugiro, by Roger M. Sherman, his attorney, respectfully shows unto your honors that he is unlawfully imprisoned and restrained of his liberty, contrary to law, and in

violation of the Constitution of the United States and of the statutes of the United States, by Augustus A. Brush, as agent and warden of the State prison at Sing Sing in the southern district of New York. 24

The facts concerning the detention of your petitioner and the claim or authority by virtue of which he is so detained are as follows:

Your petitioner was convicted by the name of Schihiok Jugigo, in the Court of Oyer and Terminer, in the county of New York, on or about December 3, 1889, of the crime of murder, and on December 16, 1889, was sentenced to death. Said sentence was by an appeal pending in the Court of Appeals until December 1, 1890, stayed.

On September 9, 1890, a petition was duly filed in the said 25
Circuit Court of the United States for a writ of *habeas corpus* to examine into the cause of the detention of your petitioner upon the claim that his judgment and sentence was void under the Constitution of the United States, and such proceedings were thereupon had that an appeal was duly allowed to the Supreme Court of the United States from a decision of said court in the premises, and that final judgment in said proceedings was not on December 1, 1890, and has not yet been entered, and no mandate has been issued out of said Supreme Court upon which final judgment in said proceedings could be entered.

On said 1st day of December, 1890, petitioner was arraigned 26
before said Court of Oyer and Terminer, and, being then and there required to allege why a day should not be fixed to put him to death under said judgment and sentence, he duly showed and sustained, by full complete and due proof, the fact aforesaid, and duly objected that by force of section 766 of the Revised Statutes of the United States any proceeding to carry out said judgment or sentence in said Court of Oyer and Terminer, or by or under the authority of the State of New York, before final judgment should be entered in said proceedings in said Circuit Court, were null and void.

But said Court of Oyer and Terminer then and there disregarded 27
and refused to entertain his said objection, allegation and proof, and sentences him to be put to death in the week commencing January 12, 1891; and remanded him to the custody of said Augustus A. Brush, to be executed accordingly, and said Augustus

A. Brush now holds petitioner and restrains him of his liberty for the purpose of so killing your petitioner, in violation of said statute
28 of the United States, and not otherwise.

Your petitioner, therefore, prays that this honorable court do forthwith issue the writ of *habeas corpus* to the said Augustus A. Brush, agent and warden as aforesaid, requiring him to produce the body of said petitioner before this court at some time to be designated in said writ, there to abide what shall be awarded by said court in the premises; and at the same time he prays your honors to issue out of said court the writ of *certiorari* to the said Court of
29 Oyer and Terminer in said county of New York, and the clerk thereof, commanding it or him forthwith to certify to the said Circuit Court of the United States true copies of the indictment, judgment-roll, orders, commitments and warrants, and objections, motions, certificates and proceedings in said court remaining, and particularly such as were filed or had December 1, 1890, under or by virtue of which said petitioner is now deprived of his liberty by authority of that court.

ROGER M. SHERMAN,
30 *Attorney for Petitioner.*

County of New York, *ss.:*

Roger M. Sherman, being duly sworn, says that he is authorized by Shibuya Jugiro, the petitioner, to make, sign and verify the foregoing petition; that he has read the same and knows its contents, and that the same is true to his knowledge, information and belief

ROGER M. SHERMAN.

31 Sworn to before me, this 3d day of January, 1891.

John A. Shields,
U. S. Commissioner, S. D. N. Y.

"C."

UNITED STATES CIRCUIT COURT,
SOUTHERN DISTRICT OF NEW YORK.

EX PARTE SHIBUYA JUGIRO.

The petitioner, Shibuya Jugiro, conceiving himself aggrieved by the final decision of this court declining to grant the writ of *habeas corpus* herein, doth hereby appeal therefrom to the Supreme Court of the United States, and he prays that this his appeal may be allowed and that a transcript of the record herein may be sent to the said Supreme Court.

Dated NEW YORK, *January* 7, 1891.

ROGER M. SHERMAN,
Attorney for Petitioner.

The foregoing appeal is hereby allowed and the clerk of this court is hereby directed to send to the Supreme Court of the United States a transcript of the petition, decision, order thereupon and of this appeal.

Dated NEW YORK, *January* 7, 1891.

E. HENRY LACOMBE,
Circuit Judge.

"D."

UNITED STATES OF AMERICA, ss.:

The President of the United States to Augustus A. Brush, Agent and Warden of Sing Sing Prison in the State of New York, and Charles F. Tabor, Attorney-General of the State of New York, GREETING:

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States to be holden at the city of Washington on the second Monday of October next, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein Shibuya Jugiro is appellant, and said Augustus A. Brush, as agent and war-

den, is appellee, to show cause, if any there be, why the decision in the said appeal mentioned should not be corrected and speedy
36 justice should not be done to the parties in that behalf.

Given under my hand at the city of New York, in the Second Circuit, this 7th day of January, 1891.

E. HENRY LACOMBE.

ROGER M. SHERMAN,
Attorney for Appellant, 140 *Nassau streeet, New York.*

"E."

37 CIRCUIT COURT OF THE UNITED STATES.

IN AND FOR THE SECOND CIRCUIT AND SOUTHERN DISTRICT OF NEW YORK.

SHIBUYA JUGIRO, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AS AGENT AND WARDEN, APPELLEE.

I, John A. Shields, clerk of the above-named court, do hereby certify that the appeal of the above-named appellant was allowed on
38 the 7th day of January, 1891, and filed in my office on the 3d day of February, 1891. That a citation to the above-named Augustus A. Brush, as agent and warden, was issued on the 7th day of January, 1891. That said citation is returnable on the second Monday of October, 1891, and has not yet been filed in my office.

I further certify that I am, therefore, unable to prepare and certify the complete record on appeal to the Supreme Court of the United States herein, for the reason that said citation has not been filed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this third day of
39 [SEAL.] February, in the year of our Lord, one thousand eight hundred and ninety-one, and of our independence the one hundred and fifteenth.

JOHN A. SHIELDS,
Clerk.

"F."

CIRCUIT COURT OF THE UNITED STATES.

IN AND FOR THE SECOND CIRCUIT AND SOUTHERN DISTRICT OF NEW YORK.

SHIBUYA JUGIRO, APPELLANT,

vs.

AUGUSTUS A. BRUSH, AS AGENT AND WARDEN, APPELLEE.

CITY AND COUNTY OF NEW YORK, *ss.*

William J. Lardner, of said city, being duly sworn, says that he is assistant to the Attorney-General of the State of New York. That at the request of said Attorney-General deponent called at the office of Roger M. Sherman, Esq., the appellants' attorney, in the Morse Building, corner of Nassau and Beekman streets, in the city of New York, on Monday February 2, 1891, and there saw said Sherman, and in the name of said Attorney-General requested said Sherman to file at once with the clerk of the United States Circuit Court for the Southern District of New York, the appeal of the named appellant, and also the citation issued to the appellee herein. Mr. Sherman, in reply to deponent's request, stated that he would file the appeal but would not file said citation before the first week of October next, and requested deponent to so inform said Attorney-General that he refused to file said citation before the first week of October next.

WILLIAM J. LARDNER.

Sworn to before me this 4th day of February, 1891.

JOSEPH E. LA BADIE,
Notary Public, N. Y. Co. (174).

SUPREME COURT OF THE UNITED STATES.

44 IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

To ROGER M. SHERMAN, *Attorney for Appellant,*
140 *Nassau street, New York city:*

SIR.— You will please take notice that I shall move the Supreme Court of the United States, a term of which is now being held at the city of Washington, District of Columbia, on the 9th day of March, 1891, at the opening of the court on that day or as soon
45 thereafter as counsel can be heard, for the following relief, judgment or order:

First. That the appeal herein taken by you in behalf of Schihiok Jugigo, heretofore convicted of murder at a court of Oyer and Terminer of the Supreme Court of the State of New York, held in and for the city and county of New York, which appeal was taken in and by the name of Shibuya Jugiro, from an order made by the Hon. E. Henry Lacombe, Circuit Judge of the United States at a court held by him on the 7th day of January, 1891, denying the petition of the said appellant for a writ of *habeas corpus*, be in all things dismissed, or that the order so appealed from be affirmed,
46 on the ground that the said appeal was taken for delay only, and on the further ground that the Supreme Court has no jurisdiction of said appeal, and that the question on which the same depends is so frivolous as not to need further argument.

Second. That in case the said Supreme Court shall deny the said motion to dismiss or affirm, then that the said court make an order directing the filing by you forthwith with the clerk of the said Circuit Court of the said petition and of all papers read by you on the said pettion for a writ of *habeas corpus*, together with the citation made and the appeal taken in said proceeding, with all other papers in said
47 case necessary to make up a record thereof, and that the said clerk of said Circuit Court be directed forthwith thereupon to file said record and papers with the clerk of the said Supreme Court. And that said appeal and case be advanced for argument and that the same be docketed and the record thereof printed within such times

as to the said Supreme Court may seem meet and proper, in order that the same may be speedily heard and determined. 48

Third. For such other and further relief as in the premises may be meet and proper.

And you will further take notice that this motion will be made upon the petition of the undersigned, a copy of which is herewith served upon you and upon all the papers and exhibits thereto attached, copies of which are also herewith served upon you.

Dated *February* 10, 1891.

CHARLES F. TABOR, *Att'y-Gen'l,*
Attorney for A. A. Brush, Agent and Warden,
and for the State of New York, Appellees herein. 49

Office and post-office address, the Capitol, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

IN THE MATTER OF THE APPEAL
OF
SHIBUYA JUGIRO.

To the Supreme Court of the United States: 50

The supplemental petition of Charles F. Tabor, Attorney-General of the State of New York, respectfully shows that after the printing and service of the foregoing and attached petition, affidavits and notice of motion at least three weeks before the 9th day of March, 1891, in accordance with the rules of this court, your petitioner was informed by Roger M. Sherman, attorney for the appellant herein, that he had inadvertently sent to your petitioner a copy of the original draft of the petition herein, and which was not, in fact, a true copy of the petition presented to Judge Lacombe upon the application made to him for a writ of *habeas corpus* on 51 January 7, 1891. And your petitioner now further shows that the annexed Exhibit "G," produced by said Sherman, is a copy of the petition which was, in fact, presented to said court and filed with the clerk thereof, to which reference is hereby made.

And your petitioner further alleges, upon information and belief, that as to the objections or grounds set forth in said petition,
52 which, in substance, allege that counsel was assigned to the appellant upon his arraignment who was not an attorney or counselor-at-law, admitted or qualified to practice in the courts of the State of New York, and that persons of the color and race of the said appellant were excluded on account of their said race and color from the grand jury which indicted the said appellant and from the petit jury before which he was tried, the same were not, nor was either of them, made or raised at any stage of the trial of the said indictment or upon the appeal from the judgment of conviction
53 to the Court of Appeals.

And your petitioner further alleges, upon information and belief, that Jacob Berlinger and John R. Heinzelman were assigned as counsel to represent the said appellant upon the trial of said indictment, and both united in the notice of appeal taken from the judgment of conviction to the Court of Appeals, which information was derived from the affidavit of John Sparks, hereto annexed and marked Exhibit "H," and which your petitioner verily believes to be true.

CHARLES F. TABOR.

54 Dated *February* 27, 1891.

UNITED STATES OF AMERICA:

STATE OF NEW YORK, } ss.:
City and County of Albany, }

Charles F. Tabor, being duly sworn, says: I am the petitioner named in the foregoing petition and in the supplemental petition, and that I have read the same and know the contents thereof, and that the same are true to my own knowledge, except as to the
55 matters therein stated to be alleged upon information and belief, and as to those matters I believe them to be true.

CHARLES F. TABOR.

Sworn to before me, }
February 27, 1891. }

WALTER L. CHILDS,
Notary Public, Albany County, N. Y.

STATE OF NEW YORK,
CITY AND COUNTY OF ALBANY, } *ss.:*
Clerk's Office,

56

I, Ansel C. Requa, clerk of the said city and county, and also clerk of the Supreme and County Courts, being courts of record held therein, do hereby certify that Walter L. Childs, whose name is subscribed to the jurat of the annexed affidavit, was, on the day of the date thereof, a notary public in and for the county of Albany, dwelling in said county, duly authorized to administer oaths for general purposes; and that I am well acquainted with the handwriting of the said notary public, and verily believe that the signature to the said jurat is genuine.

57

In testimony whereof, I have hereunto set my hand and [SEAL.] affixed my official seal this 27th day of February, 1891.

A. C. REQUA,
Clerk.

"G."

To the Judges of the Circuit Court of the United States for the Southern District of New York:

The petition of Shibuya Jugiro, by Roger M. Sherman, his attorney, respectfully shows unto your honors that he is unlawfully 58 imprisoned and restrained of his liberty, contrary to law, and in violation of the Constitution of the United States, and of the statutes of the United States, by Augustus A. Brush, as Agent and Warden of the State Prison at Sing Sing, in the Southern District of New York.

The facts concerning the detention of your petitioner, and the claim or authority by virtue of which he is so detained, are as follows:

Your petitioner was convicted by the name of Schihiok Jugigo, in the Court of Oyer and Terminer in the county of New York, on 59 or about December 3, 1889, of the crime of murder; and on December 16, 1889, was sentenced to death. Said sentence was, by an appeal pending in the Court of Appeals, until December 1, 1890, stayed.

On September 9, 1890, a petition was duly filed in the said Circuit Court of the United States, for a writ of *habeas corpus* to
60 examine into the cause of the detention of your petitioner, upon the claim that his judgment and sentence was void under the Constitution of the United States; and such proceedings were thereupon had that an appeal was duly allowed to the Supreme Court of the United States from a decision of said court in the premises, and that final judgment in said proceedings was not, on December 1, 1890, and has not yet been entered; and no mandate has been issued out of said Supreme Court upon which final judgment in said proceedings could be entered.

On said 1st day of December, 1890, petitioner was arraigned
61 before said Court of Oyer and Terminer, and being then and there required to allege why a day should not be fixed to put him to death under said judgment and sentence, he duly showed and sustained by full, complete and due proof the fact aforesaid; and duly objected that, by force of section 766 of the Revised Statutes of the United States, any proceeding to carry out said judgment or sentence in said Court of Oyer and Terminer, or by or under the authority of the State of New York, before final judgment should be entered in said proceedings in said Circuit Court, were null and void.

But said Court of Oyer and Terminer then and there disregarded
62 and refused to entertain his said objection, allegation and proof, and sentenced him to be put to death in the week commencing January 12, 1891; and remanded him to the custody of said Augustus A. Brush, to be executed accordingly; and said Augustus A. Brush now holds petitioner and restrains him of his liberty for the purpose of so killing your petitioner in violation of said statute of the United States, and not otherwise.

Also in this, that whereas, by the Constitution and laws of the State of New York, said petitioner was upon the trial of the indictment aforesaid entitled to counsel and appeared upon his arraign-
63 ment without counsel, and was asked by the said court of Oyer and Terminer if he desired the aid of counsel, and answered that he did; the said court thereupon assigned him as counsel,
who afterwards took part in all the proceedings upon said indictment, and directed and controlled the defense thereunder, one not

admitted or qualified to practice as an attorney or counselor-at-law in the courts of said State, of which petitioner was at all times in all the proceedings aforesaid ignorant. And thereby petitioner was 64
deprived of due process of law for his defense; and particularly in this, that whereas petitioner was an alien subject of the Emperor of Japan and unacquainted with the laws of the State of New York, and was unable to speak or understand the English language; he was obliged to rely wholly upon said counsel for his defense and for the presentation of each and all objections, evidence and arguments which were useful, convenient or necessary for the protection of his rights. The said indictment alleged that the wound inflicted by petitioner was in the breast of one Mura Commi, who was alleged to have been murdered by petitioner. The issue tried was 65
whether petitioner had wounded said Commi in self-defense or without provocation, by stabbing him from behind. The proof was that the wound was not in the breast, but in the neck, from behind. Having no notice by said indictment that petitioner would be called upon to explain a wound from behind, said allegation was misleading, and the proof was a substantial variance from the indictment, which petitioner is advised would have constituted a valid objection to the admission of evidence, the reception of a verdict and in arrest of judgment, had his rights in that behalf been duly asserted by lawful counsel. But all the occasions having passed when, in the lawful course of procedure, 66
the objection could be taken, not having been duly taken, reserved and presented, petitioner has suffered great prejudice. And in other respects his rights upon his trial were prejudiced and sacrificed by the said assignment of counsel.

But now so it is that neither by motion for a new trial nor by motion in arrest of judgment, nor otherwise, under the limitations of the laws of the State of New York, can any court of said State take cognizance or afford petitioner any relief in the premises; and petitioner has no remedy or protection in respect thereto, except under the fourteenth amendment to the Constitution of the United 67
States, as an additional guaranty to the Constitution of the State of New York, for his protection upon an equality with all in the enjoyment of his right to the assistance of counsel and to due process of law in that respect.

And, therefore, petitioner alleges that said judgment and sentence and his restraint thereunder are without due process of law.

68 Also in this, that said indictment was found by a grand jury in the Court of General Sessions of the Peace in and for the city and county of New York, at the November term of said court, 1889; that from the list and panel of jurors from which said grand jury was selected and drawn certain and all persons of the color and race of petitioner, who is a native born subject of the Emperor of Japan, and dark brown in color, were excluded on account of their said race and color, although many persons of said race and color naturalized citizens of the United States, and in all respects qualified to serve as such jurors, were at the time of the selection of said

69 list and panel resident and being within said city and county, and who might otherwise have been drawn to serve upon said grand jury. And the same is true of the petit jury drawn to try the said indictment.

Petitioner was ignorant of said facts in respect to said jurors at all the times aforesaid.

But now so it is that neither by motion for a new trial nor by motion in arrest of judgment, nor otherwise, under the limitations of the laws of the State of New York, can any court of said State take cognizance of or afford petitioner any relief in the premises, and petitioner has no remedy or protection in respect thereto, except

70 under the fourteenth amendment of the Constitution of the United States, for his right to the equal protection and due process of law, in the premises.

And, therefore, petitioner alleges that said indictment, and the proceedings thereupon and his restraint thereunder, are in violation of the laws and the Constitution of the United States and void.

Your petitioner, therefore, prays that this honorable court do forthwith issue the writ of *habeas corpus* to the said Augustus A. Bruth, agent and warden, as aforesaid, requiring him to produce the body of said petitioner before this court at some time to be

71 designated in said writ, there to abide what shall be awarded by said court in the premises; and at the same time he prays your honors to issue out of said court the writ of *certiorari* to the said Court of Oyer and Terminer in said county of New York, and the clerk thereof, commanding it or him forthwith to certify to the said

Circuit Court of the United States true copies of the indictment, judgment roll, orders, commitments and warrants, and objections, motions, certificates and proceedings, in said court remaining, and particularly such as were filed or had December, 1st, 1891, under or by virtue of which said petitioner is now deprived of his liberty by authority of that court. 72

ROGER M. SHERMAN,
Attorney for Petitioner.

COUNTY OF NEW YORK, *ss.:*

Roger M. Sherman, being duly sworn, says that he is authorized by Shibuya Jugiro, the petitioner, to make, sign and verify the foregoing petition; that he has read the same and knows its contents, and that the same is true to his knowledge, information and belief. 73

ROGER M. SHERMAN.

Sworn to before me this 3d day of January, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. N. Y.

(A copy.)

JOHN A. SHIELDS,
Clerk.

"H."

SUPREME COURT OF THE UNITED STATES. 74

IN THE MATTER OF THE APPEAL
OF
SHIBUYA JUGIRO.

STATE OF NEW YORK,
CITY AND COUNTY OF NEW YORK, } *ss.:*

John Sparks, being duly sworn on oath, deposes and says that he is now and at all times hereinafter mentioned was the clerk of the Court of General Sessions of the Peace in and for the city and county of New York, and likewise the clerk of the Court of Oyer and Terminer in and for the city and county of New York. 75

Deponent further says that at a term of the said Court of General Sessions of the Peace, begun and holden at the City Hall, in said city of New York, on the 1st Monday in November, 1889, to wit:

on the 15th day of November, 1889, an indictment was duly found and presented by the grand jury of the city and county of New
76 York against the said appellant by the name and style of Shihiok Jugigo, accusing him of the crime of murder in the first degree of one Mura Commi, committed the 10th day of November, 1889; that thereafter, by an order of said Court of General Sessions made the 19th day of November, 1889, the said indictment was, on motion of the district attorney in and for the said city and county of New York, removed for trial into the said Court of Oyer and Terminer in and for the city and county of New York; that thereafter, at a Court of Oyer and Terminer in and for the city and county of New York, held at the City Hall, in said
77 city of New York, on the 3d day of December, 1889, before the Hon. John R. Brady, one of the Justices of the Supreme Court of the State of New York, and presiding justice at said Court of Oyer and Terminer, said appellant was, by the name and style of Shihiok Jugigo, convicted by the verdict of a jury of the crime of murder in the first degree of one Mura Commi, as by said indictment was charged against him; that thereupon, at a term of said Court of Oyer and Terminer, held at the City Hall, in the city of New York, on the sixteenth day of December, then next ensuing, judgment was given in said court upon the said conviction of murder in the first degree, that the said appellant, by the name of Shihiok Jugigo,
78 suffer the punishment of death, in the mode and manner prescribed by the laws of this State, and the said court did thereupon appoint the week commencing the 3d day of February, 1890, the week within which said judgment was to be executed; that thereupon the said appellant, by the name and style of Shihiok Jugigo, duly appealed from the said judgment to the Court of Appeals of the State of New York, and, by reason of the said appeal, the execution of the said judgment and sentence was stayed pending the determination of the said appeal; that thereafter, at a term of said Court of Appeals held at the Capitol, in the city of Albany, on the
79 7th day of October, 1890, the said judgment of said Court of Oyer and Terminer, so appealed from as aforesaid, was, by the judgment of the said Court of Appeals, in all things affirmed, and the record therein and the proceedings in the said last-mentioned court, upon the said appeal were, by the said judgment, remitted

to said Court of Oyer and Terminer there to be proceeded upon according to law; that thereafter, at a Court of Oyer and Terminer held in and for the said city and county of New York, at the City 80
Hall, in said city of New York, on the 26th day of November, 1890, the said judgment of the said Court of Appeals was by an order then and there duly made and entered by the said Court of Oyer and Terminer, made the judgment of the said Court of Oyer and Terminer; and the said judgment was then and there by the same order directed to be enforced and carried into execution and effect.

Deponent further says that thereafter, at a Court of said Oyer and Terminer held on the 1st day of December, 1890, before the Honorable John R. Brady aforesaid, one of the justices of the Supreme Court of the State of New York, and presiding justice at 81
said Court of Oyer and Terminer, said appellant having been duly arraigned by the name of Shihiok Jugigo, and being then and there present in court, it was ordered by the said court by an order then and there duly made and entered, that the said appellant by the said name and style of Shihiok Jugigo for the murder in the first degree aforesaid, whereof he had been convicted as aforesaid, and sentenced to the punishment of death, be remanded to the custody of the warden and agent of the State prison of the State of New York, at Sing Sing, in said State of New York, there to be kept in solitary confinement until the week commencing on Monday, the 12th day of January, 1891, and that upon some 82
day within the week so appointed the said warden and agent of the State prison at Sing Sing, do execution upon the said appellant by the name and style of Shihiok Jugigo in the manner and form prescribed by the laws of the State of New York.

Deponent further says that it was never objected by or on behalf of said appellant, at any stage of the said proceedings, that either by the laws of the State of New York, or by the action of the officers charged with impanneling the jury, all Japanese were excluded from the jury impanneled to try the said appellant.

Deponent further says that the said appellant was actually and 83
actively represented upon the trial in said Court of Oyer and Terminer by Messrs. Jacob Berlinger and John R. Heinzelman as associate counsel, both of whom were assigned as counsel to represent said appellant by the said Court of Oyer and Terminer;

and both of whom signed, on behalf of the appellant, notice of appeal to the Court of Appeals of the State of New York, from
84 the said judgment of the said Court of Oyer and Terminer rendered against the said appellant on the 16th day of December, 1889, as aforesaid; and further deponent saith not.

JOHN SPARKS.

Subscribed and sworn to before me, this 20th day of February, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

SUPREME COURT OF THE UNITED STATES.

85

IN THE MATTER OF THE APPEAL
OF
SHIBUYA JUGIRO.

To ROGER M. SHERMAN, Esq., *Attorney for Appellant,*
140 *Nassau street, New York city:*

SIR. — You will please take notice that in pursuance of and upon the original notice of motion, petition, affidavits and exhibits heretofore and on the 14th day of February, 1891, served upon you,
86 and upon the foregoing supplemental petition and affidavit of John Sparks attached thereto, now served upon you as well as upon the printed record filed herein with the Clerk of the Supreme Court, I shall move the said court at a stated term thereof, now being held at the city of Washington, District of Columbia, on the 9th day of March, 1891, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for the relief, judgment or order demanded in said original notice of motion heretofore as aforesaid served upon you, to which notice of motion reference is hereby made.

Dated *February 27th*, 1891.

87

CHARLES F. TABOR, *Att'y-Gen'l,*
Attorney for A. A. Brush, Agent and Warden,
and for the State of New York, Appellees herein.

Office and post-office address, Capitol, Albany, N. Y.

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1682.

IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

BRIEF FOR AGENT AND WARDEN

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

and both of whom signed, on behalf of the appellant, notice of appeal to the Court of Appeals of the State of New York, from
84 the said judgment of the said Court of Oyer and Terminer rendered against the said appellant on the 16th day of December, 1889, as aforesaid; and further deponent saith not.

JOHN SPARKS.

Subscribed and sworn to before me, this 20th day of February, 1891.

JOHN A. SHIELDS,
U. S. Commissioner, S. D. of N. Y.

SUPREME COURT OF THE UNITED STATES.

85

IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

To ROGER M. SHERMAN, Esq., *Attorney for Appellant,*
140 *Nassau street, New York city:*

SIR. — You will please take notice that in pursuance of and upon the original notice of motion, petition, affidavits and exhibits heretofore and on the 14th day of February, 1891, served upon you,
86 and upon the foregoing supplemental petition and affidavit of John Sparks attached thereto, now served upon you as well as upon the printed record filed herein with the Clerk of the Supreme Court, I shall move the said court at a stated term thereof, now being held at the city of Washington, District of Columbia, on the 9th day of March, 1891, at the opening of the court on that day, or as soon thereafter as counsel can be heard, for the relief, judgment or order demanded in said original notice of motion heretofore as aforesaid served upon you, to which notice of motion reference is hereby made.

Dated *February 27th*, 1891.

87

CHARLES F. TABOR, *Att'y-Gen'l,*
Attorney for A. A. Brush, Agent and Warden,
and for the State of New York, Appellees herein.

Office and post-office address, Capitol, Albany, N. Y.

APR 3
JAMES H. McKENNEY

Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1632.

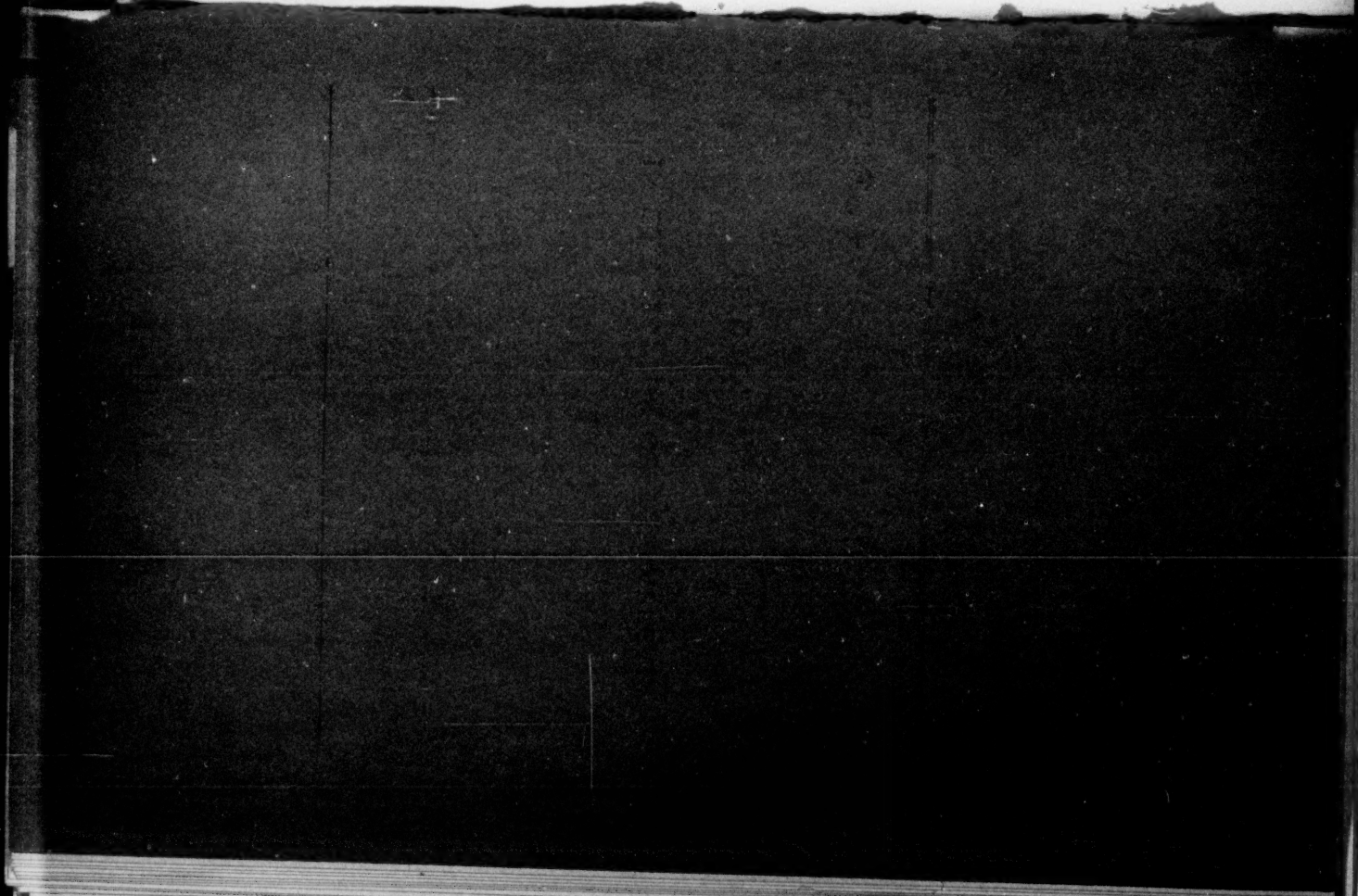
IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.



Supreme Court of the United States,

OCTOBER TERM, 1890.

No. 1632.

IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

BRIEF FOR AGENT AND WARDEN.

CHARLES F. TABOR,
Attorney-General of New York,
Of Counsel, Albany, N. Y.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1632.

IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

BRIEF FOR AGENT AND WARDEN.

Appeal by Jugiro from an order of the Circuit Court of the Southern District of New York, entered January 7, 1891, denying application for a writ of *habeas corpus* to the Agent and Warden of the New York State Prison at Sing Sing.

STATEMENT OF FACTS.

Jugiro was convicted of the crime of murder at a Court of Oyer and Terminer held in the city and county of New York, December 16, 1889; and the court, upon entry of judgment of conviction, sentenced him to the punishment of death, and appointed the week commencing February 3, 1890, as the week within which the sentence must be executed; and ordered the sheriff of New York county, within ten days thereafter, to deliver the petitioner with the death warrant, to the agent and warden of Sing Sing State Prison, with direction to the warden to keep him in solitary confinement and to do execution of the sentence upon the petitioner according to law, upon some day within the week so appointed.

The petitioner was delivered to the warden within the time prescribed in the order of the court, and has ever since remained in his custody.

December 21, 1889, the petitioner appealed from the judgment of conviction to the New York Court of Appeals, which, on October 7, 1890, affirmed the judgment in all things, and judgment of affirmance was entered November 26, 1890.

The case is reported in 123 New York, at page 630, and the following is the opinion of the court:

"The defendant was convicted of murder in the first degree in the Oyer and Terminer in the city of New York. He has appealed to this court.

"The record does not contain a single exception, and we are unable to see any reason for bringing the appeal, except to delay the execution of the judgment. The evidence established beyond a doubt the commission of the crime, and the charge of the judge was fair, and properly instructed the jury upon the law needful for their guidance.

"There can be no pretense for saying that the ends of justice require a new trial, and the judgment should be affirmed."

Pending this appeal to the Court of Appeals, on September 12, 1890, Roger M. Sherman, acting as attorney for the petitioner applied to the Circuit Court for the Southern District of New York, for a writ of *habeas corpus* to be directed to the warden of the prison to release the petitioner from the custody of the warden on the ground that he was illegally restrained of his liberty, and was so restrained in violation of the Constitution and laws of the United States. An order was, on the same day, made denying the application, and Mr. Sherman, as attorney for the petitioner, appealed to this court from such order. The appeal was argued here November 21st, and the final judgment of this court entered on November 24, 1890, ordering, adjudging and decreeing that the order of the Circuit Court appealed from be affirmed, with costs.

February 6, 1891, a mandate upon this judgment was issued and filed in the office of the clerk of the Circuit Court, and on February 12, 1891, an order entered in the Circuit Court making the judgment of this court the judgment of that court, and directing that the warden might have execution for his costs.

December 1, 1890, the warden took the petitioner before the New York Oyer and Terminer, pursuant to an order of the court, upon the application of the district attorney, under sections 503 and 504 of the New York Code of Criminal Procedure, for the purpose of having the time fixed within which the sentence of death should be executed by the warden, and the court made an order fixing such time for the week beginning January 12th 1891.

January 7, 1891, Mr. Sherman, acting as attorney for the petitioner, made another application to the Circuit Court for a writ of

habeas corpus, alleging, as grounds of the application, that when thus arraigned, and being then and there required to allege why a day should not be fixed to put him to death under the judgment and sentence previously rendered, he objected, and showed that, under section 766 of the Revised Statutes of the United States, any proceeding to carry out such judgment and sentence would be null and void before final judgment was entered in the proceedings in the Circuit Court; and he alleged that final judgment had not then been entered in such proceeding, and that no mandate had been issued out of the Supreme Court upon which final judgment in such proceedings could be entered.

The petition alleges that the court disregarded and refused to entertain his objection and proof, and sentenced him to be put to death in the week commencing January 12, 1891, and remanded him to the custody of the warden to be executed accordingly.

The petition also alleges that one of the two counsel assigned by the court to defend the petitioner was not an attorney or counselor-at-law of the courts of the State of New York, and that the petitioner was a native-born subject of the Emperor of Japan, and dark brown in color; and that all persons of the same race and color had been excluded from the list from which the panel of the grand jurors who found the indictment against him, and of the petit jurors who tried the indictment, were drawn. The petition was not signed or sworn to by the petitioner, but by Mr. Sherman, who makes oath that it "is true to his knowledge, information and belief."

No proof of any of the allegations of the petition was presented or offered to the Circuit Court when the application for the writ was made.

POINTS.

I.

THE ALLOWANCE OF THE WRIT OF HABEAS CORPUS WAS NOT A MATTER OF RIGHT; BUT RESTED TO A GREAT EXTENT IN THE DISCRETION OF THE COURT.

In Ex parte Milligan (4 Wall., 2), the court held: Where the cause of imprisonment is fully shown by the petition, the court may, without issuing the writ, consider and determine whether, upon the facts presented in the petition, the prisoner, if brought before the court, would be discharged.

In re Hoover (30 Fed. Rep., 51), the District Court, Southern District of Georgia, Speer, J., held: "A clear, irreconcilable antagonism between the Federal law and and the State law must be shown to allow the writ."

In Ex parte Royall (108 U. S., 252, 253), the court said: "If it is apparent upon the petition that the writ, if issued, ought not, on priciples of law and justice, to result in the immediate discharge of the accused from custody, the court is not bound to award it; * * * and the court is not deprived of discretion as to the time and mode in which it will exert the powers conferred upon it."

Ex parte Terry (128 U. S., 289, 301, 302), is to the same effect.

The latter case was decided subsequent to the passage of the act of March 3, 1885 (chap. 353, 23 Statutes at Large, 437, amending section 764, R. S. U. S).

II.

THE PETITION PRESENTED TO THE CIRCUIT COURT WAS INSUFFICIENT TO AUTHORIZE THE GRANTING OF A WRIT OF HABEAS CORPUS.

It was not signed by the petitioner or verified by him.

There was no proof before the Circuit Court of the necessary facts to confer upon it jurisdiction to grant the writ. Section 754 of the Revised Statutes provides that application for the writ shall be made by complaint in writing "signed by the person for whose relief it is intended, setting forth the facts," etc., and that "the facts set forth in the complaint shall be verified by the oath of the person making the application."

The petition is signed "Roger M. Sherman, Attorney for Petitioner." It is sworn to by Mr. Sherman.

No reason is alleged why it is not signed or sworn to by the petitioner. Mr. Sherman does not allege that he has personal knowledge of the truth of the facts alleged in the petition. He merely says that the petition "is true to his knowledge, information and belief."

It is not stated what part is true to his knowledge, or what part is true to his information, or what the sources of such information are, or what part is true to his belief, or what are the grounds of such belief.

Inasmuch as section 753 prohibits the granting of a writ in such cases where the prisoner is in jail, unless he "is in custody in violation of the Constitution or of a law of the United States," it is

submitted that the provisions of section 754 should be complied with and there should be clear and competent proof of the facts which are the grounds of the application.

Especially should this rule be adhered to where the petitioner, as in this case, seeks by facts *aliunde* the record to show that his imprisonment is unlawful.

The provision with reference to applications for writs of *habeas corpus* is similar in this respect to the requirement of section 641, which provides that the petition for removal of a cause must state the facts and be verified by the defendant.

In commenting upon this provision, the court, in Virginia v. Rives (100 U. S., at page 332), say: "So far as the accused is concerned, the law requires him to state and verify the facts, and from them the court will determine whether such denial or inability exists. His naked averment of such denial or inability can hardly be deemed sufficient; if it were so, few prosecutions would be retained in a State court for insufficient allegations when the accused imagined he would gain by the removal. (Citing Texas v. Gaines, 2 Woods, 344.) There must be such a presentation of facts as to lead the court to the conclusion that the averments of the accused are well founded."

In the present case the complaint of the petitioner is grounded entirely upon alleged errors in the State court or unlawful acts of public officers. The legal presumption is that the court has rightly decided, and that the public officers have done their duty; and this presumption is proof to that effect, of which the court below was bound to take judicial notice; and until such presumption was overcome, or at least rebutted by proof on the part of the petitioner, the court could not properly grant the writ.

Unsupported averments in the complaint, not sworn to by the petitioner or by any person shown to have any knowledge upon the subject, are not sufficient for such a purpose.

III.

THE PETITIONER WAS NOT DEPRIVED BY THE ACTION OR DECISION OF THE OYER AND TERMINER OF ANY RIGHT IN VIOLATION OF THE CONSTITUTION OR OF ANY LAW OF THE UNITED STATES.

We will examine the grounds of complaint in the order in which they are set forth in the petition.

First. It is alleged that, by virtue of the provisions of section 766 of the Revised Statutes, the order of the Oyer and Terminer made on December 1, 1890, directing the warden to execute the judgment of conviction and sentence of death previously rendered, was null and void.

It appears that on September 12, 1890, the petitioner had applied to the Circuit Court for a writ of *habeas corpus*, which was denied and an appeal taken to this court, which was argued; and on November 24, 1890, the decree of this court was entered, of which the following is a copy:

"No. 1508.

"SUPREME COURT OF THE UNITED STATES,

"October Term, 1890.

"Shibuya Jugiro, Appellant,

"*vs.*

"Augustus A. Brush, Agent and Warden of Sing Sing Prison in "the State of New York.

"Appeal from the Circuit Court of the United States for the Southern District of New York.

"This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Southern District of New York, and was argued by counsel.

"*On consideration whereof*, It is now here ordered, adjudged and decreed by this court, that the decree of the said Circuit Court in this cause, be, and the same is hereby affirmed with costs.

"*November* 24, 1890."

It is submitted that this was a "final judgment" on the appeal within the meaning of the term as used in section 766, and that the statutory stay of proceedings therein then terminated, and that thereafter the Oyer and Terminer was at liberty to proceed in the case in accordance with the requirements of the Code of Criminal Procedure of the State of New York.

The decree of this court finally decided and determined every question and matter at issue in such proceeding or upon such appeal,

and nothing of substance remained to be decided or disposed of therein by any Federal Court.

It was, when entered, the final judgment of this court; and it is immaterial whether the mandate was then or subsequently issued or never issued at all.

The mandate is simply the process of the court by which the judgment of the court is enforced. It is no more a part of the judgment than an execution issued upon a judgment in a State court.

It is so regarded in all the Federal statutes where reference is made to the mandate of the court.

Sections 701, 703, 704, 1040 R. S.

The rules of the court so define it.

Paragraph 5, rule 24.
Paragraph 7, rule 10.
Paragraph 6, rule 24.
Rule 28.

It is evident, from the expressions used in the statutes and the rules, that it is synonymous with process; or, rather, that it is a kind of process, for the reference is usually to a "mandate or other process."

In the present case the order was affirmed, with costs.

It is different where the judgment appealed from is reversed and a new trial granted, or where it is modified and the court below is directed to proceed and enter final judgment in accordance with the directions of the court.

This court has repeatedly held that when its judgment has been pronounced and entered, it is final; and the mandate is simply the process for the enforcement of the judgment, and the court below has no judicial discretion in the matter unless the judgment provides for a new trial or further hearing in that court.

Durant v. Essex Co., 101 U. S., 555.
Chaires v. United States, 3 How., 611.
Sibbald v. United States, 12 Pet., 488.

In Durant v. Essex County, the chief justice, at pages 556 and 557, says: "On a mandate from this court affirming a decree, the Circuit Court can only record our order and proceed with the execution of its own decree as affirmed.

It has no power to rescind or modify what we have established. * * * The result of an appeal to us was an affirmance of what had been done below. After the appeal had been taken, the power of the court below over its own decree was gone. All it could do after that was to obey our mandate when it was sent down. We affirmed its decree and ordered execution."

The Legislature and the courts of New York have defined a "final judgment" in accordance with the views here contended for.

The Code of 1848, § 245.
Code of Civil Procedure, § 1200.
Clason v. Shotwell, 12 Johns., 30.
Valentine v. Central National Bank, 4 Monthly Law Bulletin, 12, 13.
Wilkins v. Earle, 46 N. Y., 358.

The provision of section 766 was a statutory stay of proceedings in the State courts until final judgment upon the appeal in this court; and the moment judgment upon the appeal in this court was entered, the stay terminated, and the State court could immediately proceed in the cause, although notice of the entry of the judgment of this court had not been given to the appellant or to the court below.

Petrie v. Fitzgerald, 2 Abb. Pr. (N. S.), 354.

It has also been held that where proceedings upon a judgment have been stayed until final judgment upon an appeal, and the decision of the appeal has been orally announced and entered upon the minutes, but no formal judgment entered, the issuing of an execution before the entry of formal judgment upon the appeal is not a nullity, but simply an irregularity.

Bowman v. Tallman, 19 Abb., 84.
Ackroyd v. Ackroyd, 3 Daly, 38.
Mallory v. East River Ins. Co., 7 Hill, 192.

This court, in Commissioners, etc., v. Lucas, Treasurer (93 U. S., 108), defined the term "final judgment."

At pages 113 and 114, it is said: "If, by any direction, the entire cause is, in fact, determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment."

Section 194 of the New York Code of Civil Procedure provides that the judgment or order of the Court of Appeals must be remitted to the court below to be enforced according to law.

That court held in Wilkins v. Earl (*supra*) that a judgment entered upon and in conformity with a remittitur from the court was not an actual determination of the court below. That the remittitur was controlling upon the court below, and left nothing to be determined by it; and that its duty and power were simply to enforce the judgment of the Court of Appeals.

Second. The petitioner alleges that one of the counsel assigned to defend him was not, in fact, an attorney and counselor-at-law of the courts of the State of New York.

There is no pretense that the other attorney assigned to defend him was not an attorney and counselor-at-law.

The provision of article 6 of the amendments to the Federal Constitution has no application. It is confined in its operation to trials in the Federal courts.

There is no provision in the New York State Constitution upon the subject.

It is entirely a matter of legislative grace.

Section 308 of the Code of Criminal Procedure provides: "If the defendant appear for arraignment without counsel, he must be asked if he desire the aid of counsel, and if he does, the court must assign counsel."

The court discharged its full duty in this respect.

It assigned two counsel; and its selection cannot be criticised or reviewed in any way.

As attorneys are officers of the court, the legal presumption is that the persons assigned were attorneys, and were known to the court to be competent to act in that capacity, and its action cannot be impeached or attacked collaterally.

Third. The petitioner alleges that he is a subject of the Emperor of Japan, and that all naturalized citizens of his race and color were excluded, on account of their race and color, from the list from which the panel of grand jurors that found the indictment against him, and the panel of petit jurors who tried the indictment, were made up.

It needs no argument to demonstrate the insincerity and frivolousness of this objection.

It appears, from the census of 1880, volume 1, page 402, that there were only sixteen Japanese, all told, in the city of New York, out of a population of one million, two hundred thousand.

Whether any of the sixteen are naturalized, how many are men, of full age, possessed of the qualifications of jurors, does not appear; but it is gravely attempted to arrest the administration of justice in the State of New York because one of the number did not happen to be upon the list of jurors from which the panels of grand and petit jurors were drawn in this case.

The law of New York, in prescribing the qualifications of jurors, makes no discrimination on account of race or color.

Sections 1079 and 1090, Code of Civil Procedure.
Sections 1638 and 1641, chap. 410, Laws of 1882.

The case is not brought within the scope of the first section of the fourteenth amendment, which has for its object the prohibition of any action by the State which will be equivalent to a denial to any person within its jurisdiction of the equal protection of its laws.

It is not claimed that the State of New York has done or authorized anything to be done which denies to a naturalized Japanese citizen of the State the right or privilege of serving as a juror in her courts of record.

IV.

A WRIT OF HABEAS CORPUS CANNOT ISSUE UPON ANY OF THE GROUNDS OF COMPLAINT SET FORTH IN THE PETITION.

They are all of such a character that they might have been presented for the consideration of the Oyer and Terminer, either upon the trial of the case or when the petitioner was brought up for the purpose of having the time of execution fixed; and if the decision of the court had been adverse to the petitioner, and it involved the question of a violation of the Federal laws or Constitution, the case could have been brought into this court for review by writ of error.

The State court had jurisdiction of the petitioner and of the offense for which he was tried; and if, in the exercise of that jurisdiction, it committed an error to the prejudice of the petitioner, and in violation of any provision of the Constitution or laws of the United States, that error must be corrected, if at all, by the ordinary methods of review by this court of the proceedings of the trial court. The writ of *habeas corpus* cannot, insuch cases, be made to answer the purposes of a writ of error.

Ex parte Parks, 93 U. S., 18.
Ex parte Yarborough, 110 U. S., 651.
Ex parte Bigelow, 113 U. S., 328.

In re Coy, 127 U. S., 759.
In re Lane, 135 U. S., 443.
Stevens v. Fuller, 136 U. S., 468.
In re Grimley, 137 U. S., 147.
In re Lancaster, 137 U. S., 393.

When the Oyer and Terminer, on December 1, 1890, made the order fixing the period of time within which the sentence of death should be executed, it had jurisdiction expressly given it by statute to inquire into the circumstances, and determine whether any legal reason existed against the execution of the sentence.

The provisions of the New York Code of Criminal Procedure upon the subject, as amended by chapter 489 of the Laws of 1888, are as follows:

"Section 503. Whenever, for any reason other than insanity or pregnancy, a defendant sentenced to the punishment of death has not been executed pursuant to the sentence, at the time specified thereby, and the sentence or judgment inflicting the punishment stands in full force, the Court of Appeals, or a judge thereof, or the Supreme Court or a justice thereof, upon application by the Attorney-General or of the district attorney of the county where the conviction was had, must make an order, directed to the agent and warden or other officer in whose custody said defendant may be, commanding him to bring the convict before the Court of Appeals or a General Term of the Supreme Court in the department, or a term of the court of Oyer and Terminer in the county where the conviction was had. * * *

"Sec. 504. *Upon the defendant being brought before that court, it must inquire into the circumstances, and if no legal reason exists against the execution of the sentence, it must issue its warrant* to the agent and warden of the State prison mentioned in the original warrant and sentence, under the hands of the judge or judges, or a majority of them, of whom the judge presiding must be one, commanding the said agent and warden to do execution of the sentence during the week appointed therein. The warrant must be obeyed by the agent and warden accordingly. The time of the execution within said week shall be left to the discretion of the agent and warden to whom the warrant is directed; but no previous announcement of the day or hour of the execution shall be made, except to the persons who shall be invited or permitted to be present at said execution as hereinafter provided."

It will thus be seen that the law conferred upon the trial court, by express enactment, the jurisdiction to determine the precise question which the counsel for the petitioner alleges, in his petition, he submitted to it, viz.: That the time for the execution of sentence upon his client could not be fixed, because the proceedings in the State courts were stayed by virtue of the provisions of section 766 of the Revised Statutes. He also avers in his petition that he submitted proof to sustain his objection.

The court was called upon to determine the question whether upon the facts presented the statutory stay of proceedings still existed. It decided the question adversely to the petitioner.

Grant, for the sake of the argument, that it was erroneous and in violation of a Federal statute. It was, nevertheless, the decision of a court of competent jurisdiction upon a question properly before it, and was conclusive upon all parties until reversed or set aside in the course of the ordinary methods of direct review provided by law.

This decision of the Oyer and Terminer was reviewable by writ of error.

It is immaterial whether the petitioner could have appealed to the higher State courts or not.

We think it clear that he might have done so. In such event, the assumption is that the appellate tribunal would have corrected the error complained of.

Had it not done so a writ of error would have brought the whole record into this court for review.

But the counsel for the petitioner alleges that there could have been no appeal in the State courts, and that the laws of New York afforded no means of relief. If this is true, then a writ of error could have issued out of this court to review the decision of the Oyer and Terminer, if it was in violation of any Federal law.

Section 709 provides that a writ of error may be issued to review the decision of a State court, if it is a court in which the decision to be reviewed is final, although not the highest court of the State.

It has been repeatedly so held.

Downham v. Alexandria, 9 Wall., 659.
Gregory v. McVeigh, 23 Wall., 294.
Windsor v. McVeigh, 93 U. S., 274.

In Ex parte Parks (*supra*), this court held that it was immaterial whether there was any other mode of review; that if the trial

court had jurisdiction and committed an error, a writ of *habeas corpus* could not issue, although there was no review by writ of error or appeal.

V.

THE APPEAL SHOULD BE DISMISSED OR THE ORDER AFFIRMED, BECAUSE THE OBJECT OF THE APPLICATION FOR A WRIT HAS BEEN GAINED; AND IF THE ORDER WAS REVERSED AND A WRIT DIRECTED TO ISSUE, THE CIRCUIT COURT WOULD BE COMPELLED TO REMAND THE PETITIONER TO THE CUSTODY OF THE WARDEN.

Special reference is here made to the objection that the order of the Oyer and Terminer directing the sentence of death to be executed on some day in the week beginning January 12, 1891, was null and void under the provisions of section 766, Revised Statutes, as this is the only objection in regard to which the petitioner alleges that he made or offered any proof at the time the order was made.

Section 491 of the New York Code of Criminal Procedure provides that, from the time of the delivery of a prisoner, under sentence of death, to the warden, until the infliction of the punishment of death upon him, he shall be kept in solitary confinement at the State prison.

The sole object which the petitioner had in view in applying for the writ was to prevent the infliction of the death penalty upon him during a certain week in January.

Owing to the liberal provisions of the Federal statute, that object has been fully accomplished without the issuance of the writ; and the whole proceeding has spent its force, and ought not to be further continued.

It has been repeatedly held in analogous cases that the court will dismiss the appeal.

Trustees of Huntington v. Nicoll, 3 Johns., 596.
People v. Supervisors of Greene, 12 Barb., 217.
The People ex rel., etc. v. Common Council, 82 N. Y., 575.
Pugh v. McCormick, 14 Wall., 361.
San Mateo Co. v. Southern Pacific R. R., 116 U. S., 138.
Ex parte Terry, 128 U. S., 289.

Chancellor Kent very forcibly puts the proposition in Trustees of Huntington v. Nicoll, at page 596:

"What use can there be in such an appeal? To reverse an order which has long since expired is absurd. It would be doing an idle act, which does not comport with the gravity of a court of justice.

"It is one of the maxims of the common law, and which is a dictate of common sense, that the law will not attempt to do an act which would be vain or to enforce an act which would be frivolous."

In the People, etc., v. Common Council, the New York Court of Appeals, at page 576, say: "The official term, therefore, over which the controversy arose is already ended. Nobody can be appointed for the disputed period, since it has already gone. The new election has presumably occurred; and nothing remains but the abstract question, who was right? We do not decide mere abstract questions, from the determination of which no practical result can follow. In such cases we have heretofore dismissed the appeal and see no reason for changing the rule now."

In Pugh v. McCormick this court refused to grant a new trial although the former decision was erroneous, because by reason of a statute subsequently enacted the trial court would have been required to give the same judgment on the second trial that it erroneously gave on the first.

In San Mateo Co. v. Railroad, this court dismissed a writ of error because it appeared that there was no longer an existing cause of action.

In Ex parte Terry, this court refused to grant an original application for a writ upon the ground that it appeared that, if the prisoner was brought into court and the cause of his commitment inquired into, he would be remanded to prison.

VI.

Whatever disposition the court may make of the appeal, it is respectfully urged that a direction be given that the mandate be immediately issued in order that the State may not be further unnecessarily delayed in executing the judgment of conviction.

Dated *March* 31, 1891.

CHARLES F. TABOR, *Att'y-Gen'l,*
Attorney for Warden and for the People.

I. H. MAYNARD, *Dep. Att'y-Gen'l,*
Of Counsel.

Office Supreme Court U. S.
FILED
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JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States,

OCTOBER TERM, 1890.

IN THE MATTER OF THE APPEAL

OF

SHIBUYA JUGIRO.

Supplemental Brief for State of New York and Agent and Warden.

CHARLES F. TABOR,
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OF

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SUPPLEMENTAL BRIEF OF ATTORNEY-GENERAL.

STATEMENT.

It appears from the supplemental petition of the Attorney-General, attached to the moving papers herein, that a mistake was made in the printing of the petition of the appellant herein marked Exhibit B, on page 8 of the printed motion papers. The petition actually used upon the application for the writ of *habeas corpus* is attached to the supplemental petition returned to and filed with this court. From this petition it appears that the petitioner set up as additional grounds for his release, other than those contained in the first petition printed, the following, in substance:

First. That upon the arraignment of the appellant upon the indictment at the Oyer and Terminer, in the first instance, the said court assigned for the defense of the prisoner counsel who took part in all the proceedings "upon said indictment, and directed and controlled the defense thereunder, one not admitted or qualified to practice as an attorney or counselor-at-law in the courts of said state," and it is thereby alleged that the appellant was deprived of due process of law.

Second. That the indictment of the appellant was found by a grand jury, which was selected from a list and panel of jurors, from which were excluded all persons of the color and race of the appellant, "who is a native born subject of the Emperor of Japan, and dark brown in color," which exclusion was on account of the race and color of the persons excluded, "although many persons of said race and color, naturalized citizens of the United States, and in all respects qualified to serve as such jurors, were, at the time of the selection of said list and panel, resident and being within said city and county, and who might otherwise have been drawn to serve upon said grand jury, and the same is true of the petit jury drawn to try the said indictment."

Necessarily these questions were not discussed in the main brief filed herein. It is understood that the first ground of objection stated has reference to the fact that one of the counsel assigned by the court, viz.: Mr. John R. Heinzelman, was not, in fact, an attorney of the Supreme Court or entitled to practice as such counsel in the courts of the State of New York. It appears from the affidavit of Mr. Sparks, attached to the supplemental petition, that "the said appellant was actually and actively represented upon the trial in said Court of Oyer and Terminer by Messrs. Jacob Berlinger and John R. Heinzelman, as associate counsel, both of whom were assigned as counsel to represent said appellant by the said Court of Oyer and Terminer, and both of whom signed, on behalf of appellant, notice of appeal to the Court of Appeals of the State of New York from the said judgment of the Court of Oyer and Terminer, rendered against said appellant on the 16th day of December, 1889."

The Attorney-General has no knowledge, in fact, whether the said Heinzelman was or was not admitted or qualified to practice as an attorney and counselor-at-law in the courts of the State of New York.

POINTS.

I.

Section 308 of the Code of Criminal Procedure provides: "If the defendant appear for arraignment without counsel he must be asked if he desire the aid of counsel, and if he does the court must assign counsel." Section 63 of the Code of Civil Procedure provides: "A person shall not ask or receive directly or indirectly compensation for appearing as attorney in a court in the city and county of New York, or in the county of Kings, or make it a business to practice as an attorney in a court in either of those counties, unless he has been regularly admitted to practice as an attorney or counselor in the courts of record of the State." Section 64 of the same Code provides: "A person who violates the last section is guilty of a misdemeanor, and shall be punished by imprisonment in the county jail not exceeding one month or by a fine of not less than one hundred dollars, or more than two hundred and fifty dollars, or by both such fine and imprisonment. A judge or justice of the peace within the city and county of New York or the county of Kings, who *knowingly* permits to practice in his court a person who has not been regularly admitted to practice in the courts of record of the State, is guilty of a misdemeanor, and shall be punished as prescribed in this section. But this and the last section do not apply to a case where a person appears in a cause to which he is a party."

The only provision in the Constitution of the State of New York which bears upon the question is that contained in section 6 of article 1: "And in any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions."

The only provision of the Constitution of the United States which bears upon the question is contained in the sixth amendment, viz.: "In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial * * * and to have the assistance of counsel for his defence."

At what time and under what circumstances the privilege of counsel was extended to persons charged with felony in England, see 4 Cooley's Blackstone's Commentaries, 355, and Cooley's Constitutional Limitations, 330.

II.

It is well settled that the first ten articles of amendment to the United States Constitution were not intended to limit the power of the State governments, and only had operation upon the National government. (Spies v. Ill., 123 U. S. R., 166; Hertado v. Cal., 110 U. S., 516; U. S. v. Cruikshank, 92 U. S., 542; Ellenbacker v. Plymouth County, 134 U. S., 34; In re Kemmler, 136 U. S., 436.)

It is perfectly clear, therefore, that in any view of the case the appellant herein is not in custody in violation of the Constitution of the United States, or of any law or treaty thereof within the provisions of sections 753, 762 or 763 of the Laws of Congress, so far as any of the grounds stated are concerned. And, therefore, no Federal question is involved in that regard.

And it is equally clear that the objections stated by the appellant, if entirely true, do not constitute any violation of any right or privilege of the appellant under the Constitution of the State of New York. While it allows him to appear by counsel, it does not compel the court to assign him counsel. And it was not until the enactment of section 308 of the Criminal Code (*supra*), that there existed any statutory law in this State requiring the assignment of counsel. (See People v. Supervisors of Albany County, 28 How. Pr., 22; affirmed in principle in People v. Board of Supervisors of Niagara County, 78 N. Y., 622.)

But even if the right to assignment of counsel was a constitutional privilege, the appellant waived it by not raising the question upon the trial or in arrest of judgment. (Pierson v. The People, 79 N. Y., 429; Connors v. The People, 50 N. Y. R., 240; and see point two in main brief and cases there cited.)

And, further, it is not apparent how the objection stated can have any force whatever. Whatever may be the fact as to Heinzelman being an attorney entitled to practice, it will not be claimed that Berlinger was not an attorney duly admitted and in every way qualified to take care of the rights of this appellant on the trial of this indictment and appeal.

III.

The objection that all persons of the race or color of the appellant were excluded from the petit and grand juries has no force or application here. These objections should have been brought to the attention of the trial court, which undoubtedly would have corrected the wrong, if any had been committed, by quashing the indictment or the panel; and if the Court of Appeals had failed upon proper application to it to redress any wrong in that regard this court might by writ of error review that decision. (Bush v. Kentucky, 107 U. S., 119; Ex parte Yarborough, 110 U. S., 651; In re Coy, 127 U. S., 759; Stevens v. Fuller, 136 U. S., 477; Ex parte Carll, 106 U. S., 521; Ex parte Hardin, 120 U. S., 782; Ex parte Terry, 128 U. S., 306.) The discrimination complained of did not result from the Constitution or laws of the State of New York, as expounded by its highest judicial tribunal. (See People v. King, 110 N. Y., 425; Neal v. Delaware, 103 U. S., 393.)

IV.

For all of the reasons stated, the appeal herein should be dismissed or the order affirmed; or the case should be advanced and the same set down for argument at as early a day as to the court may seem meet and proper.

CHARLES F. TABOR, *Att'y-Gen'l*,

Attorney for the State of New York and for Augustus A. Brush, Warden of Sing Sing Prison.

At the Capitol, Albany, N. Y.